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May it please the Tribunal:

With the permission of the Tribunal, we propose to discuss the Law of the Charter with a view to refuting seriatim the interpretations placed upon it by the Chief of Counsel in his Opening Statement. As far as possible we shall follow the order in which the Chief of Counsel developed the thesis of the Prosecution, and divide our discussion into the following eight sections: --

1. The Potsdam Declaration and the Law of the Charter
2. Conspiracy
3. War of Aggression
4. War in violation of Treaties, etc.
5. Murder
6. "Conventional" War Crimes
7. Personal Responsibility
8. The nature and purpose of ~~the new~~ doctrine of ~~international law proposed~~ by the Prosecution

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1. The Potsdam Declaration and the Law of the Charter

The judgment at the Nuremberg Trials states concerning the law of the Charter as follows:

"The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world."

The German Government ceased to exist on May, 1945, through conquest by the Allies or by what is commonly known as debellatio in the language of the law of nations. The Allied Powers can, therefore, exercise rights of sovereignty in the territories of which they have complete control. They can govern the country in whatever way they please. They can, if they like, behave as an absolute monarch like Louis XIV. They can, if they are so minded, set up a Tribunal to punish those persons they disfavor by laying down an ex post facto law, the rule of abstention from such legislation being a principle of justice not absolutely binding on their sovereign authority. Or perhaps they may go further and dispose of them by executive action without any trial at all. At least such an exercise would not contravene the tenets of the law of nations. It was, therefore, "not strictly necessary for the Tribunal to consider whether or not the planning, preparation or initiation of an aggressive war was an international crime involving personal responsibility before the conclusion of the London Agreement." The discussion of international law in the Nuremberg decision is, therefore, a sort of obiter dicta, a display of learning, which was not strictly necessary for the judgment itself. That, at least, is the doctrine on which the Nuremberg decision is based. We beg to draw the attention of the Honorable Tribunal to the undoubted fact that the legal relation between the Government of Japan and the Allied Governments is altogether on a different footing from that subsisting as between Germany and the Allies.

The powers of the Allied Governments and the powers of General MacArthur, as the Supreme Commander appointed by the Allied Powers and authorized to take such steps as he deems proper to effectuate the terms of the Instrument of Surrender, are indeed comprehensive. Yet those powers are not unlimited. General MacArthur is invested with the supreme power only in so far as its exercise is deemed proper and necessary for the effectuation of the terms of the Instrument. The Allies as represented by our admired or may we say beloved General are not, therefore, in a position similar to that of Louis XIV, but one resembling that of modern constitutional monarchs like William and Mary.

This basic legal distinction between the position of Germany and that of Japan is, of course, due to the circumstances in which the armistice was concluded. Unlike Germany, Japan was not at the time of its surrender overrun by the Allied forces. The Japanese mainland was still unoccupied and Japan was then in a position to offer armed resistance for some time to come, necessarily involving losses to the Allied forces. The Japanese Government consented in such circumstances to accept the peace offer of the Allies, the "terms" of which are laid down in the Potsdam Declaration. The Instrument of Surrender itself contains by reference the terms of that Declaration. That document states: "We hereby undertake for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders and take whatever action as may be required by the Supreme Commander for the purpose of giving effect to that Declaration."

"The authority of the Emperor and the Japanese Government to rule the State shall be subject to the Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of surrender."

If Japan's obligations to the Allied Powers are not unlimited but confined to the terms of the Potsdam Declaration, it naturally follows that unlike the situation in Germany, there are certain limits to the demands which the Allied Governments can make of her. Japan has a right to demand that those limits shall not be overridden. If so, there are corresponding duties involved which the Allied Powers too must observe. For no legal relation can be unilateral. And the criteria for those reciprocal rights and obligations are set forth in the terms of the Potsdam Declaration.

The juridicial basis on which these trials in the International Military Tribunal for the Far East are conducted lies in that term of the Potsdam Declaration which says ". . .stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners of war."

A. "War Crimes"

Now, we respectfully request the Honorable Tribunal to consider the interpretation of the term, "war criminals" in the above passage not at this stage of the proceedings from the angle of jurisdiction but from another angle, namely, that presented by the Law of the Charter.

1. "War Crimes" and "war criminals" are well-established terms of art in the law of nations. War crimes, according to Oppenheim, are such hostile or other acts of soldiers or other individuals as may be punishable by the enemy on capture of the

offenders. Here war crime is not used in the moral sense of the term but only in a technical legal sense. It comprises violations of certain recognized rules regarding warfare committed by members of the armed forces and other persons including the ill-treatment of prisoners of war, all hostilities in arms committed by individuals who are not members of the armed forces, espionage and war treason, and marauding acts. War crimes are acts committed during the war, especially in the field of operations, and usually dealt with summarily by a military court Minor divergence of juristic opinion may exist regarding categories to be comprised in the term "war crimes". They do not certainly comprise any acts committed prior to the outbreak of a war, though they may be connected historically with a war. When this technical term appears in diplomatic correspondence, it must, unless the contrary be shown, be construed in the technical sense, according to the well-known canon of legal interpretation.

2. This construction is further justified by the ensuing phrase, "including those who have visited cruelties upon our prisoners of war." The maltreatment of prisoners of war is but a type of the "war crimes" in the technical sense of the term.

That this, the ordinary and accepted meaning of "war crimes" is the meaning intended by the Potsdam Declaration, is supported by the fact that when that instrument means to include such a special category of those crimes as the treatment (possibly also by civilians) of prisoners of war, it carefully says so, and specifies them as within its scope. If it was really intended that the term be used as comprising the so-called "crimes against peace" and "crimes against humanity", that fact, not the maltreatment of prisoners of war, would have been particularized in the qualifying phrase.

3. This construction is further justified in the light of the so-called "Warnings" addressed to Axis nations by Allied governments and their leading statesmen.

A careful study of the declarations and statements made by various governments or their leaders would reveal that when they speak of crimes alleged to have been committed by the Axis nations they are speaking with reference to acts committed during the progress of war, such as atrocities to the civilian population in the occupied areas and the maltreatment of prisoners of war. None of them, so far as we are aware, refers to the so-called crimes against peace. Even the reference in the Moscow Declaration of November 1, 1943, to "major criminals whose crimes have no geographic location" is judged by its context to refer to the former not to the latter.

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This evidence is corroborated by a statement made by Professor Sheldon Glueck of the Harvard Law School in his article on "The Nuremberg Trial and Aggressive War." (59 Harvard Law Review 397, April, 1946). He says:

"Judging from available published data, this idea of including the launching of an aggressive war -- a 'crime against peace' -- among the offences for which the Axis Powers were to be held liable had its origin, so far as American policy is concerned, in a report to the President made on June 7, 1945, by the American Chief of Counsel for the prosecution of major war criminals. Justice Robert Jackson there said:

'It is high time that we act on the judicial principle that aggressive war-making is illegal and criminal.'"

In a note on the same page Professor Glueck confesses:

"During the preparation of the author's book, 'War Criminals: Their Prosecution and Punishment (1944)' he was not at all certain that the acts of launching and conducting an aggressive war could be regarded as international crimes. He finally decided against such a view, largely on the basis of a strict interpretation of the Treaty for the Renunciation of War (Briand-Kellogg Pact) signed in Paris in 1928. He was influenced, also, by the practical question of policy. Since liability of the leading Nazi malefactors under familiar principles of the laws and customs of war and the Hague and Geneva Conventions was clear, it seemed to be an unnecessary and dangerous complication to resort to prosecution for the 'crime' of aggressive war, involving a doctrine open to debate and one which might require long and historical inquiries not suited to judicial proceedings."

In "The Backstage at Nuremberg" by Ernest D. Hauser (Saturday Evening Post Overseas Edition for February, 1946) we are told that Justice Jackson's novel idea met with opposition on the part of Allied representatives in the six weeks' London negotiations, and that it was not until August 8 that they finally agreed upon the policy embodied in the London Agreement. The decision was made with reference to the trials at Nuremberg and it may be presumed that it was at a later date that the Allied governments agreed to adopt the same policy at the trials in Tokyo.

The Potsdam Declaration was emitted on July 26, 1945. Professor Glueck in America in 1944 was deeply concerned whether his anxiety to punish the makers of aggressive war could legitimately be satisfied by such an extension of the well-known words, and Justice Jackson was representing that extension as a novelty

in 1945. The allied policy for the extension of the term was, after prolonged negotiations, decided upon as late as on August 8, 1945, in London. How can such an extension be read into the Potsdam Declaration of July 26, 1945?

4. If the unimpeachable evidence adduced still leaves any shade of doubt and the Honorable Tribunal deems the term ambiguous and susceptible of two meanings, we beg to draw the attention of the Tribunal to that well-known rule of interpretation; a document which is ambiguous must be construed against the party who made it. Verba fortius accipiuntur contra proferentem. We also beg to call the attention of the Tribunal to another equally well-known canon of legal interpretation. The expression of one thing is the exclusion of another. Expressio unius est exclusio alterius.

B. "Justice"

The Potsdam Declaration says, "stern justice shall be meted out." It is "justice", however stern and unmitigated by mercy, that is to be meted out.

Justice means in civilized communities justice according to law.

It means that justice is to be administered by established legal rules and principles, not according to the sense of right and justice or the political predilections of the judge, however good or wise he may be.

The fact that the present Tribunal is composed not of military men but of very eminent jurists from among the Allied nations attests to the fact that the Allied nations themselves intend to administer this "justice" according to law.

In the administration of criminal justice especially, the wisdom of the canon that justice ought to be administered in conformity with established rules has long been tested by past experience, political and otherwise. The history of the Star Chamber in England amply shows that the machinery of criminal law is liable to be utilized by the powers that be for suppressing antagonistic political groups or persons. The rule against ex post facto law has been accepted by all civilized nations as a canon of criminal justice. And this canon must especially be respected in a case involving political offences.

The omnipotent English Parliament has since 1688 never resorted to ex post facto legislation to punish political offenders. Ex post facto laws, state or federal, were banned by the Constitution of the United States. And it seems that retroactive laws relative to political offences have been extremely rare in the whole history of American legislation. It is true that there were such attempts after the Civil War and two cases were brought to

the Supreme Court of the United States involving laws, state and federal, penalizing those persons who had rendered assistance to the Confederacy. It is, however, the permanent glory of that Tribunal, that in the midst of intense popular passions it declared, through Justice Field, that both laws were unconstitutional and void. A Report on Essential Human Rights, received by the American Law Institute, February 24, 1944, says in Article 9: "No one shall be convicted of crime except for violation of law in effect at the time of the commission of the act charged as an offence nor be subjected to a penalty greater than that applicable at the time of the commission of the offence." And it is said that this principle is in substance comprised in the constitutions of thirty countries. Indeed, whether constitutionally guaranteed or not, nulla poena sine lege constitutes one of the basic principles of criminal justice in civil law countries. It is true that in Nazi Germany the principle was mercilessly destroyed by an act of June 28, 1935, authorizing judges to decide cases according to the "sound popular feeling." The Permanent Court of International Justice declared in an advisory opinion of December 4, 1935, that the application of this Hitlerite legislation to Danzig was in violation of the requirement that the government of the city be by rule of law (Rechtsstaat). The Germans, as is well known, authorized the beheading of Van der Lubbe for burning the Reichstag, when the penalty for arson at the time of the fire was a term of imprisonment only. And this shocked the juridicial conscience of the whole world, including that of the Far Eastern islanders. It is the glory of the Siamese judiciary, if the report is true, that on March 24, 1946, it released Marshal Pibul and eleven major "war-criminals" who had collaborated with Japan during this war, on the ground that a new law punishing war criminals is ex post facto and cannot be applied retroactively. The sentiment that punishment by ex post facto legislation is sheer lynching in the guise of justice is not a product of the era of the Enlightment in Europe, but represents the universal conception of justice, ancient and modern, East and West, though the principle was frequently violated by despots from Nero to Hitler.

It is our contention that criminal conspiracy, the so-called crimes against peace and crimes against humanity (apart from cases which form part of the "war crimes") were crimes unknown to the law of nations. And if that has ever become law binding on nations during the war, it was not law at the time of the commission of the alleged acts, and it is clearly ex post facto regarded as unjust both in the East and the West. To apply such law to the accused at the bar is not civilized justice, not "justice" as envisaged in the Potsdam Declaration.

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In view of the natural interpretation of the term "war crimes" on one hand and in view of the universal concepts of civilized justice on the other, it is our contention that that part of the Charter providing for "conspiracy","Crimes against Peace", and "Crimes against Humanity" insofar as they are not comprised in the "war crimes", are not the law for this Tribunal. Just as that part of an act of American Congress in contravention of the Constitution of the United States and that portion of an order-in-council which goes beyond the authority delegated by a British Act of Parliament is null and void, so that part of the Charter which is against the fundamental document -- the Potsdam Declaration, the terms of which have also been incorporated in the Instrument of Surrender -- must be declared void. It is a general principle of law that the obligations undertaken by one party can not arbitrarily be increased by the other party or parties. A strict observance by both parties of a solemn international pledge is the sine qua non for good faith and amity among nations.

II Conspiracy

The Chief of Counsel does not state in so many words, that the doctrine of conspiracy as a crime is an institute of the law of nations. But he assumes it, for he states, "this section of the Charter creates no new law." (p.8) And by "law" the Chief of Counsel means the law of nations. In this particular case, however, the Chief of Counsel does not as in the case of aggressive war cite any assembly participated in by large groups of nations which recognized conspiracy as an international crime. He does not cite any treaty, declaration, or resolution by which it was designated as a criminal act. Instead he merely cites the opinion of the U.S. Court of Appeals in Mario v. the United States and says:

"This offence is known to and well recognized by most civilized nations, and the gist of it is so similar in all countries that the definition of it by a Federal Court of the United States may well be accepted as an adequate conception of this offence."

This is astonishing! Does not every comparative jurist know that the doctrine of criminal conspiracy is a peculiar product of English legal history? It is a theory of criminal jurisprudence unknown we believe in other legal systems and certainly not known to all -- as it must be to be internationally valid. Says Professor Francis B. Sayre: "It is a doctrine as anomalous and provincial as it is unhappy in its results. It is unknown to the Roman law; it is not found in modern continental codes; few continental lawyers ever heard of it." Unlike what is observed

in the instances of parliamentary government, the rule of law, the criminal jury, habeas corpus or the trust, civilians do not entertain any high regard for this particular Anglo-Saxon institute. Especially that part of the doctrine which is stated on p. 13 is palpably unfair and shocking to juridical conscience.

"All of the conspirators need not join in the commission of an overt act, for if one of the conspirators commits an overt act, it becomes the act of all the conspirators."

Civilians will have to confess that this is going back to the collective responsibility which prevailed in the tribal age of mankind. It is all the more reprehensible as it is designed to extend to all crimes against peace, all war crimes and all crimes against humanity. For this means that once a war is declared to be aggressive or in breach of international law or treaties, any person who rendered war service to his own country whatever his motives, is held responsible for murder and other horrible crimes committed by others, even if he is totally unaware when, where, and by whom those crimes were committed.

The civilians are frankly told by their Anglo-Saxon confreres that the doctrine of conspiracy is a convenient legal weapon for prosecutors and judges bent on punishing groups disfavored by the powers that be. They might also be told that it was used in England with effect to punish members of the trade unions -- a social group highly unpleasant to the dominant class in the eighteenth century as we read in Adam Smith's "Wealth of Nations" and also in the nineteenth century as is pointed out by Sidney Webb's "History of Trade Unionism". And they might further be told that enlightened judges and jurists in the English speaking countries do not look upon this particular doctrine as an ornament worthy of lending lustre to the common law.

Did not Professor Francis B. Sayre of the Harvard Law School after making a careful study of the subject say:

"Under such a principle every one who acts in cooperation with one another may some day find his liberty dependent upon the innate prejudices or social bias of an unknown judge. It is the very antithesis of justice according to law."

"A doctrine so vague in its outlines and uncertain in its fundamental nature as conspiracy lends no strength or glory to law, it is a veritable quicksand of shifting opinion and ill-considered thought." "It is a doctrine which has proved itself the evil genius of our law wherever it has touched it. May the time not be long delayed in coming when it will be nothing more than a shadow stalking through past cases."

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What would eminent lawyers like the late Lord Russell of Killowen in England and the late Justice Oliver Wendell Holmes, Jr., in America say to a proposal to import this oppressive doctrine into the international arena?

Especially strange to civilians is the Chief of Counsel's application of the doctrine in the form of what he terms "Progressive conspiracy". Unlike the case of the Third Reich he cannot, of course, prove that the accused were a "united band who were in agreement with one another" and admits that "there appear to have been sharp differences of opinion between them and fierce rivalries". Nevertheless, the Chief of Counsel, like a true prosecutor, endeavors to read, if not sermons in every stone, a conspiracy, a constructive conspiracy into every progressive turn of events in a nation's international career, in a world in which national armaments, use of armed force for safeguarding national interests and the institution of war are not yet relics of bygone days. If his logic is correct, you could equally read "progressive conspiracies" in the expansion of England, France and Holland, the growth of the Russian Empire, and the gradual expansion of the original thirteen American states into the great American Republic, for which their foremost statesmen and warriors must be held criminally responsible.

The judgment at Nuremberg hesitates to say that any and every significant participation in the affairs of the Nazi Party or government is evidence of a conspiracy that is in itself criminal. It says that "conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action." This has certainly disarmed the doctrines of conspiracy of those most oppressive features which, convenient as they are for enmeshing the innocent, shock juridical conscience. But the judgment did not reject the doctrine itself. It should be remembered, however, that the law of the Charter was regarded, like an English act of parliament, as absolutely binding on the Tribunal in Europe, while here the Charter is like an American act of legislature, subject to the Higher Law, viz. the express terms solemnly laid down in the Potsdam Declaration.

And it our contention that even in the attenuated form of the Nuremberg decision as applied to the "Crimes against Peace", it was not an institute of the law of nations at the time the alleged "crimes" were committed, that no international lawyer ever dreamed of it until perhaps June, 1945.

III War of Aggression

The Chief of Counsel next deals with "War of Aggression". He asks: "Is this a crime under international law and has it been so understood during all the time referred to in the Indictment?" He claims it is and endeavors to establish two things: "first that there is international law on the subject, and second that it is a crime under that law".

He first cites general statements on the growth of international law by custo made by such respectable authorities as Justice Cardozo, Lord Wright, Sir Frederic Pollock, the Judicial Committee of the Privy Council, the Statute of the Permanent Court of International Justice and the decision of the Mixed Claims Commission, United States and Germany. The views these expounded on this head of custom are, of course, for the most part commonplaces well-known to every student of international law.

Then the Chief of Counsel concludes:

"Having shown .... that when many civilized nations have acted on a matter of general welfare it becomes recognized as a principle of international law, we shall now show that the question of aggressive war has been considered by so many nations and deliberately outlawed by them that their unanimous verdict rises to the dignity of a general principle of law."

By citing the respectable authorities mentioned above, the Chief of Counsel may have shown that as a historical process concerted action of many civilized nations tends to the establishment of a principle of international law, and that international tribunals recognize certain sources of the law of nations, among whic international custom is comprised. But he has not shown and cannot show any juridical principle that the concerted action of many civilized nations on a matter of general welfare ipso facto establishes a general principle of international law. The authorities he cites do not propose to lay down that sort of doctrine. Take, for example, the famous Declaration of Paris.

"Privateering is and remains abolished" formed part of the Declaration adopted at the Conference of Paris in 1356 with reference to Maritime Law, and all civilize states have since become signatories of the Declaration except the United States, Spain and Mexico. Did this declaration in 1856 by many civilized nations elevate the prohibition of privateering to a principle of international law? Is it not a fact that the Declaration was regarded by all international jurists as binding as between the signatories only and that privateering could be used by and against the three countries mentioned above?

In 1898, the United States Government announced its intention not to resort to privateering, but to adhere to the rules of the Declaration. Does this not show that she was otherwise not bound not to resort to privateering? Was not Spain regarded as perfectly justified and not violating any principle of the law of nations in having maintained her right to issue letters of marque?

Again, the Geneva Convention of July 27, 1929 relative to the Treatment of Prisoners of War has been signed by many civilized nations. Does the Soviet Union, who has not signed it, consider itself bound by the provisions of that Convention, as embodying a general principle of the Law of Nations?

However, the Chief of Counsel seems to assume that the thesis holds not alone as a matter of historical process but as a juridical principle. On that assumption the Chief of Counsel cites a number of international conventions which, he alleges, prove that aggressive war has long been an international crime. But the evidence adduced palpably fails to prove the proposition.

1. The first convention he cites is the first Hague Convention. The phrases "as far as possible" and "as far as circumstances allow" mentioned in the provisions the Chief of Counsel has in mind prove, on the contrary, that the signatories were not prepared to be legally bound to settle all their differences by pacific means. Apart from "vital interests" and "national honor", self-defence may not indeed have allowed the assumption by the contracting parties of such a duty, as illustrated in the case of the Netherlands, in Appendix A, Section 10 of the present Indictment, where it is said.

> "Consequently, the Netherlands Government immediately after the last mentioned attacks, declared war on Japan in self-defence."

2. The next convention he cites is the Hague Convention III. The Chief of Counsel asserts that by that agreement undeclared wars were branded as <u>international crimes</u>, which is, of course, sheer <u>ipse dixit</u>.

This convention recognizing that hostilities should not commence without previous and explicit warning is a minor technical rule which is considered desirable mainly for purposes of clarifying the time at which a state of war comes into being. The fact that even the 24 hours interval proposed by the Netherlands delegation was rejected at the Conference goes to prove this. Treachery is largely a matter in the forum of conscience and a war can be treacherous with or without a declaration. Grotius said long ago in his classic work, "In ancient and medieval societies east and west the declaration of war was connected with gallentry." That idea still lingers in the popular imagination which, as is well known, is fully utilized by war propagandists in denouncing the enemy as "treacherous". But Grotius continues: "the cause for which nations have required a declaration for a lawful war was not, as some allege, that they might do nothing secretly or by a clever trick, for that consideration belongs rather to the perfection of gallentry than to law, as we read some peoples even appointed the day and place of combat, but that it might appear with certainty that the war was not waged by private audacity but by the will of the people on either side, or their heads; for that is the source of its peculiar effect which have no place in a contest with brigands or in one between the King and his

subjects." The main purpose in regarding declaration of war as desirable in the modern society of nations is no more gallantry -- a matter of subjective conscience --, but technical legal expediency in determining the consequences of a state of war. Since the days of Grotius, however, many a Great Power, despite Grotius' injunction opened hostilities without any declaration of war. General Maurice of England who had published in 1883 his laborious work, entitled "Hostilities without Declaration of War," examining the commencement of various wars that had taken place from 1700 to 1872, wrote in April, 1904, in the "Nineteenth Century and After" as follows:

> "Numerically, within the time I more particularly examined, Britain struck thirty of these blows, France thirty-six, Russia seven (not reckoning her habitual practice towards Turkey and other bordering Asiatic states, including China), Prussia seven, Austria twelve, the United States five at least."

Would it not be chimerical to assert that the leading Powers such as Great Britain, France, Russia, Prussia, Austria and the United States were habitual delinquents in treachery and perfidy in war for the breach of this technical recommendation of international law?

Whether or not the Hague Convention III imposed any legal duty on the signatories is a matter of controversy, whatever views various governments may have entertained about the matter. Eminent international jurists in England such as Lawrence, Westlake, and Bellot opine that the wording of the convention indicates that this did not impose any legal duty on the signatories. Westlake thinks that law on the subject did not seriously affect the previous law. Pitt-Cobbett's classic "Leading Cases on International Law", (1924 edition by Hugh H. L. Bellot) says on p. 18 of Vol. II:

"At the same time, the signatories do not pledge themselves absolutely to refrain from hostilities without a prior declaration, but merely recognized that as between the belligerents hostilities 'ought not to commence without previous and unequivocal warning'. The object, no doubt, was to exclude cases in which it might be necessary to use instant force in order to repel some hostile preparation or movements occurring either at a place where communication with the war declaring authority would be difficult, or under circumstances where the party would obviously have no cause for complaint of surprise." And Bellot concludes his discussion by saying that despite the limits imposed by custom and convention, the opening of hostilities appears to be mainly a question of strategy. And the passage here cited stands unaltered in the 1937 edition of the same work, edited by another scholar.

There are, however, other authors who assume that a legal duty was undertaken by the signatories of the Convention III. Oppenheim, for instance, states:

> "There is no doubt that, in consequence of the Convention III recourse to hostilities without previous declaration of war, or a qualified ultimatum is prohibited."

And he further intimates that the states which deliberately order the commencement of hostilities without a previous declaration of war or a qualified ultimatum commit an international delinquency.

Even assuming that the latter view is correct, and that a breach of such a technical rule of international law is an international delinquency, the illegal act would even in Oppenheim's view be in the nature of a breach of contract or a tort and not of an "international crime," as the Chief of Counsel asserts. Certainly no international lawyer ever imagined that the signatories to the Convention III thereby agreed that statesmen who participated in a breach of this technical rule should be criminally punishable.

3. The Chief of Counsel proceeds to say, "In 1919 the victorious nations, including Japan agreed that the violation of international treaties is a justiciable offence."

Perhaps the Chief of Counsel is thinking of the recommendation of the Commission of Fifteen appointed by the Preliminary Peace Conference at the end of World War I, to examine the responsibility for starting the war and for atrocities committed during its conduct. It is true that the Commission recommended that "it would be right for the Peace Conference, in a matter so unprecedented, to adopt special measures, and even to create a special organ in order to deal as they deserve with the authors of such acts" and that it declared that it was "desirable that for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law".

The Chief of Counsel, however, omits to mention that between the two World Wars the recommendation of the Commission was not followed by the nations of the world, and he also fails to mention the fact that the same commission refused to recognize "those acts which provoked the World War and accompanied its inception" such as the invasions of Luxemburg and Belgium, constituting a violation of treaty obligations, as a sufficient ground for making any criminal charge against the responsible authorities and individuals, for the reason, among others, that an investigation into the authorship of the war would entail many hardships of proof involving different and complex problems which can hardly be adequately dealt with by a court which must depend upon recollections of witnesses and must insist upon reasonable celerity of trial and punishment.

4. The Chief of Counsel then takes up the Preamble to the Geneva Protocol of 1924, and the Declaration of the eighth (eighteenth?) Assembly of the League of Nations of September 27, 1927, in which the expression, "a war of aggression is an international crime" appears.

It may be noted that this statement reflected the Geneva sentiment with its supra-state ideologies dominant. The Soviet Union, however, was then outside the "anti-communistic" League and so was the United States, which feared to be entangled into European affairs. Indeed the latter's foremost international jurist, John Basset Moore denounced Genevan international law and the Protocol inspired by it, proceeding as it did on the easy assumption that there was a close analogy between the law within a State, and the international system governing a society of sovereign nations -- as a bedlam theory, destructive of sound international law. Great Britain herself refused to ratify the Geneva Protocol because she was not prepared for compulsory arbitration and was not sure as to how such Pact can work in practice. The Protocol never came into effect nor can that Conference bind the world. The term "international crime" in treaty preambles, moreover, is employed as expressive of emphatic condemnation, just as in the phrases, "the neglect to use the toothbrush is an hygienic crime!", or "The Albert Memorial is an aesthetic crime!" The Chief of Counsel himself employed the words "unpardonable crime" on p. 6 of his Opening Statement where, we believe, it was employed in that sense. The same can be said of the resolution of the Sixth Pan-American Conference of February 18, 1928, cited by the Chief of Counsel, which declares that "war of aggression constitutes an international crime against the whole human species." Such condemnation, motivated as it may be by political or moral considerations, is without any legal connotation whatsoever.

5. Lastly, the Chief of Counsel mentions the all important Pact of Paris of 1928.

The vague stipulation of the famous multilateral treaty, which developed out of the proposal of an American-French bilateral treaty by M. Briand made with a definite political purpose, has, as is well-known, caused an abundance of speculation as to its true import, political as well as legal.

The text of the Pact consists of very simple and abstract formulae, a general renunciation of war as an instrument of national policy and a general pledge to settle all differences by peaceful means.

It may be recollected that some saw in it an epoch in history, a revolution in human psychology which would make all rules of the traditional law of nations out of date. Doubting Thomases, however, saw in it nothing but a pious expression of the will to peace, just like declarations contained in treaties of amity and commerce expressing a more categorical will to peace, viz., that there shall be "perpetual peace" or "a perfect and inviolable peace" between the contracting parties.

Astute European statesmen, like M. Briand, saw in it a gesture of the United States evincing its willingness to be drawn into the League, and into European politics. Did not M. Boncour, M. Briand's friend, authoritatively tell us that for M. Briand, before all else, it was a means to draw the United States into the League of Nations?

Many of the leading international jurists who carefully analyzed not only the text of the Pact but prior correspondence between the Powers have come to the conclusion that the Pact merely had the effect of changing the vocabulary of international law, the classical "just war" having been replaced by "defensive war". Some opined that the Pact, instead of outlawing war, had the contrary effect of affirming the legality of a defensive war.

With this historical background in mind, we shall endeavor to analyze the exact legal obligations undertaken by the signatories, especially the government of Japan, which the Prosecution alleges were broken by Japan.

It is admitted by all international lawyers that in interpreting international treaties we must get at the real intention of the parties. And it is also admitted that the real intention must be ascertained not only by the text of a treaty itself, but also by the preliminary material as well.

And courts, arbitrators and diplomats have given great importance to preliminary material in the interpretation of treaties.

Says Professor Hyde in his standard work on international law:

> "As the sense which contracting states have attached to the terms of their agreement is controlling in the estimation of those to whom are entrusted the duty of interpreting treaties, as all circumstances probative of that fact are admissible for the purpose of its establishment, the formulation of the rules of interpretation can hardly serve a useful purpose. Times when proof is not to be had are rare. Even when it is wholly lacking, it is dangerous to impute to a state assent to a particular significance of the words of a treaty."

Ralston states in his authoritative work, "The Law and Procedure of International Tribunals":

> "The events leading up to the signing of a treaty are often referred to as explanatory of the intentions of the parties entering into the treaty and so often of the prime importance in determining their intention."

With special reference to the Pact of Paris Phillip Marshall Brown says in his well-known essay published in the American Journal of International Law, April, 1929:

> "No rule of international law would seem more firmly established than this rule of interpretation of treaties in the light of intent of the negotiators. That intent naturally is assumed to be stated in the text of the treaty itself, but it also may be sought elsewhere, either in specific reservations attached to treaties at the time of signature or ratification, or in interpretations, clarifications, understandings, constructions, qualifications or actual conditions set forth during the negotiations prior to the ratification. Hence, it is to be expected that in any future divergence of opinions concerning the

nature of the obligations assumed under the General Pact for the Renunciation of War recourse must necessarily be had, not only to the official correspondence of the negotiations, but to various official utterances of such government spokesman as Sir Austen Chamberlain, M. Briand, Secretary Kellogg and Senator Borah. Their interpretations of this instrument will be entitled to the closest scrutiny and respect. So far as the commitments of the United States are concerned, the Report of the Senate Committee on Foreign Relations giving its understanding of the "true interpretation" of the Pact conditioning the American ratification must also be taken into account, whether by a judicial tribunal or by international public opinion ....."

"To make certain of the intent of every signatory to the Pact; to hold every signatory to the strict fulfilment of its commitments under that Pact, it would appear good sense and good ethics, as well as good law, to give due weight and credit to the interpretations placed on this momentous declaration by every signatory prior to ratification."

With that accepted canon of interpretation as a guide, we shall now turn to statements made by responsible statesmen in those days.

In a speech made on April 28, 1928, Secretary Kellogg said:

"There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defence. The right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defence. If it has a good cause, the world would applaud and not condemn its action."

Then Secretary Kellogg in his note of June 23, 1928, addressed to the governments invited to sign the treaty after embodying his own "constructions" of the treaty with reference to the six major "considerations" emphasized by France states:

"In these circumstances I have the honor to transmit herewith for the consideration of your excellency's government a draft of the multilateral treaty for the renunciation of war containing the changes outlined above."

In the United States, as is well-known, there was much concern about the effect of the General Pact on the Monroe Doctrine, but Mr. Kellogg assured the Senate that not only possible military operations by the United States in the Republic of Panama but the safeguarding of the Monroe Doctrine was covered by the fact that self-defence was not precluded, of which the United States is solely entitled to judge for itself.

According to the exposition by Mr. Kellogg of self-defence at the Senate, self-defence was not confined to the defence of the American territories or the defence of the Monroe Doctrine but comprised the defence of American rights everywhere.

Senator Borah in the course of his speech in the debate on the treaty in the Senate maintained that the Spanish-American War was one of self-defence, and that every nation reserved the right to employ force to protect its nationals when their lives might be endangered in foreign lands.

And we are told by Judge Moore that "I have always surmised that Senator Borah, as an advocate of the 'outlawry of war' played in this transaction a larger part than is generally known, especially as I observed that in the national campaign of 1928 he did not abate his appeals for the maintenance of an effective navy -- not, of course, for the purpose of providing the renunciation of war with 'teeth', but for the purpose of enabling the United States to exercise the right of self-defence that had been so amply safeguarded."

On May 19, 1928, the British Government presented a note to the American Government which, after quoting the renunciation of war as an instrument of national policy, declared that there were certain regions of the world the welfare and integrity of which constituted a special and vital interest for that government's peace and safety and that as their protection against attack was a measure of self-defence no interference with them could be suffered. It may be noted that the regions were not named and complete liberty of action as to their future designation was reserved. The note was an interpretation by the British Government in more or less concrete terms of that doctrine of "self-defence" which was expounded in Secretary Kellogg's speech. And in order effectually to forestall any subsequent challenge or quibble, Sir Austen Chamberlain in a note of July 18 attached the unequivocal condition which follows:

> "As regards the passage in my note of the 19th May relating to certain regions of which the welfare and integrity constitute a special and vital interest for our peace and safety, I need only repeat that His Majesty's Government in Great Britain accept the new treaty upon the distinct understanding that it does not prejudice its freedom of action in this respect."

It is true that the Soviet Government and the Persian Government refused to recognize the British reservations, but it was thought unimaginable that His Majesty's Government would not, if accused of any violation of the Kellogg Pact, invoke its own interpretation of self-defence drawn up with such meticulous care and duly deposited with the League of Nations, together with the text of the Treaty.

M. Briand in his note of July 14 declared:

> "The Government of the Republic is happy, moreover, to take note of the interpretations which the Government of the United States gives to the new treaty with a view to satisfying the various observations which have been formulated from the French point of view ... In this situation and under these conditions, the Government of the Republic is happy to be able to declare

to the Government of the United States that it is now entirely disposed to sign the treaty .... ."

How about the Japanese Government?

In a note handed by Baron Giichi Tanaka to Mr. Edwin L. Neville, American Charge d'Affairs in Tokio, on July 20, 1928, the Japanese Foreign Minister refers to the aforesaid speech of Mr. Kellogg made on April 28, stating: "You proceed to reinforce in detail the explanations made by the Secretary of State in his speech of the 28th April," and says:

"In reply, I have the honor to inform you that the Japanese Government are happy to be able to give their full concurrence to the alterations now proposed, their understanding of the original draft submitted to them in April last being, as I intimated in my Note to His Excellency Mr. MacVeagh dated the 26th of May, 1928, substantially the same as that entertained by the Government of the United States. They are therefore ready to give instructions for the signature on that footing, of the treaty in the form in which it is now proposed."

When Councillors Kubota and Tomii asked the Government in the Privy Council, as to whether self-defence is confined to the defence of territory, suggesting the applicability of the Pact to forcible measures which might become necessary in China and especially in Manchuria and Mongolia and as to whether it would not be more prudent to be as explicit in those matters as Great Britain, the Government's answer was that the self-defence was not limited to the defence of territory but extended outside of the territory. The protection of the rights and interests in Manchuria and elsewhere by forcible means was sufficiently covered by the fact that self-defence was not precluded by the Pact. And that fact is clearly stated in the Report of the Privy Council concerning the General Pact.

Thus it may be emphasized that the Foreign Minister's explanations at the Japanese Privy Council regarding the nature of self-defence were substantially the same as those made by the Secretary of State Kellogg at the American Senate.

Governments, of course, do not make these declarations and reservations as idle gestures not to be taken seriously. On the contrary, they constitute the frank and honest avowals of the governments' understanding of the obligations contracted. They constitute an inherent and essential part of the treaty obligations as if they had been written into Article I of the Pact.

The Chief of Counsel admits that the text of the Pact does not use the word "crime", and indeed not only the text but the whole correspondence fails to reveal any such idea. The League conception of "sanction" was, as was well known, anathema to the American Secretary of State. The Chief of Counsel, however, asserts that the signatories made an aggressive war "illegal". The dulcet term "aggressive war" as will be shown later, is amorphous, elusive and indefinable. But it may be granted that a non-defensive war admitted as such by the belligerent who wages it is illegal under the Pact. The Chief of Counsel then declares that it is an international

"crime". The learned Counsel's logical processes are beyond our comprehension. To us the fact that the Contracting Parties to a treaty have agreed to make a war not considered as self-defence by the belligerent illegal does not make its violation a crime. It may be a breach of contract or a tort, but it is not a crime. How can an agreement to make a thing illegal convey of itself that the thing is a crime?

We desire to draw particular attention to the fundamental principle in the interpretation of contracts, that the paramount rule is to ascertain the intention of the parties. Can it be supposed that it was the intention of the parties to any of the contractual instruments referred to in this case, that a breach of their terms would involve the liability of individuals to arbitrary penalties? If they had meant so, would they not have said so, and would they not have provided appropriate and graduated penalties and procedure to suit so novel a case of the infliction of penalties on statesmen? Or at least would they not have mentioned the liability of individuals for acts accomplished in Cabinet and Legislature, away from the rough and ready reprisals of armed conflict?

Did the signatories even intend that it was a punishable crime on the part of the state violating the Pact? It may be that a few academic enthusiasts for international sanctions as the only way to world peace ventured such an opinion. But we find very few such indications even in the academic circles of those quite recent days.

The famous Budapest Articles of Interpretations which tried to put teeth into the Pact, are, of course, not binding on the signatories. But even those Articles did not state that its violation was a crime but only provided: "A violating State is liable to pay compensation for all damage caused by a violation of the Pact to any signatory State or to its nationals."

From the foregoing it is clear that the evidence which the Chief of Counsel advances fails to substantiate his conclusion that an aggressive war has become a crime in international law by custom recognized by civilized nations.

The Chief of Counsel quotes from Lord Wright's article on "War Crimes and International Law" as evidence that his conclusion meets with the approval of students of international law.

Lord Wright is certainly a very distinguished jurist. But in this article he is, we suppose, speaking not as a judge, but as an advocate, avowedly writing ex parte, as he is perfectly entitled to do, in support of his government's thesis. His very positive contention certainly does not represent the concensus of jurists versed in the law of nations.

Even if Lord Wright's thesis were to be endorsed by all contemporary students of international law in the year of grace 1946, which is assuredly not the case, and if international law has rapidly and bewilderingly transformed itself during the present War, of which we were unaware, it is palpably ex post facto and unjust to apply those novel rules to the accused at the bar.

Moreover, in order to prove that an international customary law has been established binding on all nations, vague and often rhetorical declarations made at international assemblies and in treaty preambles are not enough. We must look not only to the animus but to the corpus, the practice of nations. The practice of nations, however, contradicts the thesis that an aggressive war involves criminality either on the part of a responsible State or on the part of responsible individual members of a State. The invasion of Ethiopia by Italy was regarded as an "aggressive war" by the League of Nations, but the only sanction imposed by that body was economic severance. And nobody suggested the criminal punishment of Italy, to say nothing of Mussolini and his cabinet. The invasion of Finland by Soviet Russia in 1939 was stigmatized by the League as a war of aggression but the only step taken was expulsion from membership. Nobody thought of criminally punishing the Soviet Union or its political or military leaders.

Another trouble with the thesis presented by the Prosecutor that aggressive war is an international crime is that the terms "aggression" and "aggressor" are too vague to be defined.

What constitutes "aggression" has attracted the attention not only of the general public but of international jurists, through the provisions of the Treaty of Versailles requiring Germany to make reparation "for all damages done to the civilian population of the Allies and their property by the aggression of Germany", and through the language employed in Article 10 of the League Covenant wherein "the members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League". The word "aggressor", of course, is not used in the League Covenant but has occasionally been used technically in League circles to designate the nations to which the sanction of the League was to be applied. Many attempts have been made by jurists and amateurs at Geneva and elsewhere to define the "aggressor". They have all been failures.

Take, in the first place, the simplist lexicographic definition in Webster's Dictionary cited by the Chief of Counsel: A first attack. The aggressor is one who fires the first shot. "A cannon shot is a cannon shot", says Briand, and "you hear it and it often leaves its traces". So you can. That is, however, a physical test; it has no necessary moral or juridical connotation. Says Judge Moore in his famous essay, entitled "An Appeal to Reason" (Foreign Affairs, July, 1933): "Although nations when they go to war always profess to repel overt acts, yet they frequently do not go to war on account of them; but an assurance of associate force would necessarily increase their propensity to do so. Moreover it is notorious that overt acts are sometimes craftily provoked for the purpose of justifying aggression." And that is the reason for Webster's alternative definition.

"an unprovoked attack". But what modern nations go to war without any provocation?

Judge Moore continues:

> " ..... the taking of a forcible initiative may be the only means of safety; and the importance of this principle is necessarily enhanced by the insistence of nations or groups of nations on maintaining preponderance of military power. Portugal acted on this principle when, in 1762, the combined forces of France and Spain were hovering on her frontiers."

Take, in the second place, the definition also cited by the Chief of Counsel.

> "The aggressor being that state which goes to war in violation of its pledges to submit the matter of dispute to peaceful settlement, having already agreed to do so."

An obviously imperfect definition, since it ignores the possibility that a nation which has agreed to arbitral processes, may find it necessary to exert warlike efforts in self-defence; and further ignores the possibility that there may exist no dispute, but simply a serious menace.

Would or would not the definition justify the landing of troops to preserve order in a disintegrated state as have often been done in Mexico and also in China? Was or was not the U. S. an aggressor when she suddenly seized and occupied Vera Cruz in April, 1914, in disregard of the Treaty with Mexico of 1848, which expressly provided neither party should resort to force before trying peaceful negotiation and if that should fail arbitration? Or was or was not the despatch of British troops to China in 1925 without recourse to the methods of settlement provided by the League Covenant an aggression?

We need not dwell on all attempts at definitions short or long concocted by jurists and amateurs at Geneva and elsewhere. They all failed, because they were attempting to define the undefinable. They were not accepted by the Powers represented at the League of Nations. Did not Sir Austen Chamberlain say: "I, therefore, remain opposed to this attempt to define the aggressor because I believe that it will be a trap for the innocent and a signpost for the guilty."? And did not Secretary Kellogg at the time when the Kellogg-Briand Treaty was being discussed object to the French proposal limiting the scope of an anti-war treaty to wars of aggression partly on that very ground?

Judge Moore further says:

> "As experience has conclusively shown that the attempt to decide the question of the aggressor on first appearance is reckless of justice, we must, unless our purposes are unholy, rely on an impartial investigation of the facts. But this takes time. The Assembly of the League of Nations assumed jurisdiction of the Sino-Japanese conflict on September 21, 1931, the report of the Lytton

Commission was signed at Peiping, China on September 4, 1932; the Assembly adopted a report of its own committee on February 17, 1933. The actual time covered by the proceedings was seventeen months and even then a final conclusion was not reached."

And the Report of the Lytton Commission itself says:

"It must be apparent to every reader of the preceding Chapters that the issues involved in this conflict are not as simple as they are often represented to be. They are, on the contrary, exceedingly complicated and only an intimate knowledge of all the facts, as well of their historical background should entitle anyone to express a definite opinion upon them. This is not a case in which one country has declared war on another country without previously exhausting the opportunities for conciliation provided in the Covenant of the League of Nations. Neither is it a simple case of the violation of the frontier of one country by the armed forces of a neighboring country, because in Manchuria there are many features without an exact parallel in other parts of the world."

If then we give up the definition of aggression and leave the matter entirely to a tribunal to decide in each case whether a particular war was aggressive or defensive, its decision, without any measure to abide by, is apt to be swayed by contemporary political prejudices. For the "aggressor" is an epithet often employed in international politics with an axe to grind, i.e. to stigmatize a political opponent as a pariah in the eyes of the world. Equity is a roguish thing, if not in civil justice, at least in that category of criminal justice, which is closely related to politics.

In view of the preceding considerations, we contend not only that the Chief of Counsel's thesis is not the law as it is but that the proposition ought not to be the law. It may at first sight appeal to uninformed and unreflective minds, but when carefully considered is a principle which does not work without doing injustice. Its application would be a most dangerous precedent for future victorious aggressors to exploit against their victims. We contend that it is a pseudo-juristic doctrine which ought to be rejected out of the holy precincts of the law of nations.

IV War in Violation of Treaties, etc.

Next, the Chief of Counsel deals with the so-called "Crimes against Peace" relative to the planning, preparation, initiation, or waging of war in violation of international law, treaties, agreements and assurances.

We are told that "here the law is well settled and has been enforced for generations."

When it was stated by the American Secretary of State at the time of the making of the Kellogg Pact that the limits of self-defence have been clearly defined by countless precedents, students of international law have remarked that it would be interesting to know what these countless precedents are, but their curiosity was never gratified. So when we are told this part of the so-called "Crimes against Peace" is well-settled and has been enforced for generations, every student of international law will rub his eyes and lament over his profound ignorance.

International law and treaties ought to be observed. No sensible persons, including all the accused, will doubt that. The Chief of Counsel asks, "Do these accused contend that these (i. e., treaty stipulations) are empty words?" Of course not. It is the height of injustice to attribute to the accused moral depravity of such a low level as to think that a nation can disregard international law and treaties. True, nations may in a particular case have a different interpretation of international law and treaties, and sometimes one nation may attribute to the other party a breach of the law or of the plighted word. But that is a matter which should be decided by an impartial tribunal. It must also be remembered that when a man is cynical about international law or treaties, it does not necessarily mean that he has a real contempt for them as such. It is often an expression of cynical sentiment over interpretations by the dominant powers of certain rules of international law or certain provisions of treaties. When Greek sophists and modern Marxists denounce the law as nothing but the expression of the interests of the dominant class, it is as often as not directed against the powers that be. If a rule of general internationa law or any provision of a treaty is violated, nobody

doubts that it is illegal. But it is a long way from pronouncing a national action to be illegal to the condemning of the individual authors of such an action as criminal and capitally so. Every civilized nation does not treat every breach of a contract or every tort as a crime. Compensation is the usual remedy for the one, and punishment for the other.

The Chief of Counsel particularly cites the Hague Convention III as an example. We shall not repeat here what has been said before. Even allowing for the moment that its violation is illegal in all cases, it does not constitute a crime on the part of the individual responsible. The punishment of "crimes against peace" in violation of treaties has never been known to the law of nations. The law is settled in a direction contrary to what the Chief of Counsel asserts it to be. Of course the accused did not "know" that their acts were "criminal" as the Chief of Counsel alleges, for everybody "knew" that they were not criminal at all in the law of nations.

V MURDER

Next, we are confronted with an explanation by the Chief of Counsel of the rather strange charge in the Indictment that the accused are guilty of murder.

The Chief of Counsel argues that in civilized countries intentional killing of a human being without legal justification is murder, citing the Japanese Criminal Code. This may readily be admitted. Then he says, "In the case before us, the deaths all occurred as a result of belligerency of war, and since the war was illegal, all the natural and normal results flowing from the original act are also illegal. This is even true under Japanese law.

"With respect, we cannot follow the logic of the Chief of Counsel. He begins by using the ambiguous epithet "illegal", meaning "illegal by the Law of Nations", and then illegitimately uses the same word to mean illegal with all the consequences and accompaniments of acts illegal by municipal law."

As a matter of fact every student of the law of nations is aware that this is not so in international law.

It is the consensus of international lawyers that even if war is commenced in breach of international law or treaties, nevertheless a state of war comes into being and both belligerents have a right to be protected by the rules of war.

In his "principles of International Law" Professor Lawrence cites an extreme case of an attack made without provocation and, without any previous diplomatic negotiation, and says, "To attack another state in a period of profound peace, without having previously formulated claims and endeavoured to obtain satisfaction by diplomatic means, would amount to an act of international brigandage, and would probably be treated accordingly." but he says, "But the state of things set upon by such abominable means would nevertheless be war, and both sides would be expected to carry on their operations according to the laws of war."

It is true that pirates are punishable as criminals against all mankind. But pirates act without any authorization from any government, and it is strange learning to treat members of the regular forces acting with the authorization of the government or persons politically responsible for the commencement of war as murderers simply because the war was commenced in an illegal manner.

It may be noted that within a State, a well organized community, persons who plan, prepare and initiate civil war are clearly acting illegally. Municipal law naturally treats them as guilty of high treason. But it normally treats them as political offenders not as common "felons" or as murderers, and the law of nations excludes them from extradition.

The Chief of Counsel further cites various provisions of the Hague Convention IV, of which Article XXIII runs as follows:

"In addition to the prohibitions provided by special Conventions it is especially forbidden.

(2) To kill or wound treacherously individuals belonging to the hostile nation or army."

The Chief of Counsel draws the conclusion from the foregoing provision:

"Therefore, to attack without warning upon another nation with which Japan was at peace constituted treachery of the worst type, and under the provisions of the Hague Convention the killing of any human being during such attack becomes murder."

It may seriously be doubted whether a sudden and strategic attack made by one nation after grave provocations and after prolonged efforts through diplomatic negotiation, and when the other nation knew that the situation had become so tense that it expected and was prepared for the opening of hostilities at any moment, can be illegal under the Hague Convention III or dubbed "treachery of the worst type." But even if this be admitted for purposes of legal argument, the conclusion of the Chief of Counsel does not follow from the foregoing provision, for the phrase to "kill or wound treacherously" clearly means "in the course of war already in progress"; otherwise there could be no "hostile nation or army." The provision cited by the Chief of Counsel does not envisage any act relating to measures provided for in the Convention III.

Thus far we have studied the Chief of Counsel's arguments elucidating his contention with the great respect due to the eminent jurist. We regret, however, to have to confess that his argument reminds one of a conjurer performing the "rabbit trick". You see the conjurer borrow an ordinary hat. He plants it on the table, and mutters some incantations over it. Then he lifts it up -- and the table is swarming with little rabbits. There were no rabbits in the hat. He put them there.

The argument of the Chief of Counsel, we venture to say, is exactly like that. He takes an ordinary hat,

the nice well-known, respectable hat of International Law, binding states and nations. He places it on the table and intones over it some weird incantation among which we can catch the words, in a loud crescendo, "unlawful", "criminal", "murder". And then he lifts the hat, and immediately the Tribunal swarms with new-born little doctrines drawn from odds and ends of municipal law, to the extreme amazement of us all. Where he got them may be immaterial. They were not surely in our silk hat. The Chief of Counsel put them there.

VI "CONVENTIONAL" WAR CRIMES

As for the "conventional" war crimes, and the "crimes against humanity" in so far as they are part of the "conventional war crimes", we admit that they may and should be punished, if guilt is established according to the established rules of international law.

War is a brutal affair. Stripped of all human justifications and excuses, and judged by the highest of human standards indicated by the Prince of Peace: Thou shalt not kill, war, defensive or aggressive, may be regarded as an institution necessarily involving murderous action. It is a notorious fact amply shown by the history of war that bloody operations involved in a war have a tendency to make the participants brutal, giving rise to many cruelties, e.g. to the civilian population, especially where the latter is suspected of a hostile action. They are the deplorable accompaniments of the bloody operations.

However natural and inevitable this may be in a war, dictates of the established law of nations require that punishment be inflicted upon the guilty, and indeed that "stern justice be meted out" to the perpetrators of such crimes is clearly within the purview of the terms of the Potsdam Declaration to which the Japanese Government plighted its honor.

Persons actually guilty of atrocious acts in contravention of the laws and customs of war may properly be punished.

And a superior officer who orders such acts to be committed may, of course, be punished. He may also be justly punished for culpable negligence, if he was in a position to prevent such illegalities.

These principles are recognized in international law, even if there may arise some doubts in cases on the borderline. Among the accused at the bar those who were civilians did not, of course, issue any orders regarding atrocities and other contraventions of the law of warfare, nor can they be charged with culpable negligence.

Even as regards those accused who were military men, they would not be guilty, unless it is shown either that they ordered atrocities or other contraventions to be committed or that they were personally guilty of culpable negligence. The Chief of Counsel bases the prosecution's charges of "orders from above" on "assumption" and on "assumption" only. For he concludes:

"These murders follow such a similar pattern over such a wide range of territory and covered such a long period of time, and so many were committed after protests had been registered by neutral nations, that we must assume only positive orders from above, i. e. those accused here in this prisoners' dock made them possible."

But it must surely be shown at what exact level they assumed command issued, an indiscriminate assumption of guilt at all levels or at all above a certain level would be essentially contrary to justice and would be revolting to the conscience of the world which looks to this Tribunal for a scrupulous apportionment of blame where blame is due.

Even if the alleged atrocities or other contraventions assume a similar singular pattern of acts such a pattern may have been a sheer reflection of national or racial traits. Crimes no less than masterpieces of art may express certain characteristics reflecting the mores of a race. Similarities in geographic, economic, or strategic state of affairs may in part account for the "similar pattern" assumed. The assumption of a command from above and from whom it issued has certainly to be proved beyond any reasonable doubt in a case of this grave character.

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VII Personal Responsibility

The Chief of Counsel then proceeds to the question of personal responsibility of the accused. He cites a decision of the Supreme Court of the United States, Ex Parte Quirin, the Saboteurs' case, in support of his thesis that the planning, preparation, initiation, and execution of war in breach of international law or of treaties involves individual responsibility. But Ex parte Quirin is a case concerning the question whether or not an American act of Congress can instead of crystallizing in permanent form and in minute detail every offence against the law of war adopt the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts.

This is simply a question of the interpretation of an Act of Congress, which might enact in constitutional terms whatever it pleased. The interpretation put by the Court on the will of the Congress, cannot bind other nations.

It is again, a far cry from adopting by reference the well-established common law of warfare in which individuals have by established custom been tried by military tribunals, to the adoption of a perfectly revolutionary doctrine that the planning, preparation, initiation, and execution of war in violation of international law and of treaties involves not alone the responsibility of the state concerned, but criminal responsibility of individuals acting on behalf of such a State. Such has expressly been denied by the consensus of international jurists and by the custom of nations and never thought of by responsible statesmen of any country, when they negotiated the international treaties. If such an interpretation had been proposed at the time of the negotiation those treaties would never have been concluded. Can it for a moment be supposed that the parties to the Kellogg Treaty intended that if they went to war in contravention thereof, they and all their soldiers should be guilty of murder. The new Charter of the United Nations Organization does not contain such a doctrine and if such a provision was made, the Charter might never have been adopted.

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We heartily agree with the Chief of Counsel that law, international and national, can grow by judicial decision as well as by legislation. But the development of law by judicial decision proceeds and ought to proceed within the bounds of the spirit and fundamental principles of a legal system.

A reference to the history of the law will show how exceedingly careful and moderate the courts have been in their development of the law they administer. They have worked like the processes of Nature, gradually and imperceptibly, not suddenly nor violently. Therefore, their work has been permanent. The court exists to administer the established law. The court is never expected by its decision to effect a revolutionary change in law. If a tribunal attempts to revolutionalize the law, it is arrogating to itself the function of a legislature.

It is true that sometimes the courts virtually legislate under the guise of legal interpretation. But such judicial legislation proceeds by the slow process of tentative and meticulous inclusion here and exclusion there, not by the overhauling of any fundamental principle of a legal system. In the Southern Pacific Co. v. Jensen (244 U. S. 205, 221 (1917)), Justice Holmes says:

"I recognize without hesitation that judges do legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common law judge could not say I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court. No more could a judge exercising the limited jurisdiction of admiralty say I think well of the common law rules of master and servant and propose to introduce it here <u>on bloc</u>."

A revolutionary legal change can properly be made only after prolonged discussions as to the pros and cons of the proposal by all concerned, which can not be undertaken by a tribunal, where the evidence for or against such change in law is extremely limited, depending as it does in large measure upon the facilities and learning which happen to be available for the counsel of the contending parties. If any fundamental

change in the law of nations is necessary, an international body like the United Nations Organization might be a proper organ, if it develops into a world legislature. But it is certainly not a task for an International Court of Justice or for a Court Military, national or international. It may be "high time" that the principle of individual responsibility in these exalted circles of government shall be introduced. But let it not be in a manner which will inevitably cast suspicion and discredit on it, by making it appear as the unilateral opinion of a conqueror. That will set back its acceptance for centuries.

And after urging the Tribunal to take this opportunity to effect a fundamental change in the system of international law, the Chief of Counsel closes his discussion of the law of the Charter by again invoking the doctrine of criminal conspiracy, as if it constituted already an institute of the law of nations.

Thus totally disregarding the eminently sound principle that guilt is personal, he declares that "these men, who held positions of and influence in the Japanese Government and by virtue of their position conspired to, and planned, prepared, initiated, and waged illegal war, are responsible for every single criminal act resulting therefrom.

He also endeavors to invigorate his thesis by referring to another theory of domestic criminal law apparently recognized in some jurisdictions that all who participated in the formulation or execution of a criminal plan in the execution of which crimes happen to be committed by some of their number are liable for each of the offences committed and for the acts of each other, whether they knew of them or not, and whether they had forbidden them or not.

On this cognate topic we also urge that this Honorable Tribunal will reject, as forming any part of the law of nations, the illogical Anglo-Saxon doctrine that if several persons are engaged in the accomplishment of an unlawful design, however insignificant, they are all equally liable for the penalties of a crime, however atrocious, committed in its furtherance by one of their number, although without their knowledge or against their express instructions. For instance, if a party of hunters are taking game unlawfully and one of them deliberately kills a warden who interferes, all the rest by this doctrine are held guilty of murder, although they know nothing of his act and would have done their utmost to prevent

it if they had known. It would be an offence to common sense to suppose that such a peculiar and unfair doctrine, based on purely historical grounds, is accepted as law by all the nations of the world.

The Chief of Counsel asserts, that excepting one point, namely, the doctrine that the official position does not protect the accused, the law laid down in the Charter represented the rules and principles of the law of nations not at the time the Charter was penned, but at the time of the acts alleged to have been committed by the accused. The question regarding ex post facto law is, according to his argument, not involved in this case.

Again, we beg squarely to join the issue on this point. The Chief of Counsel himself virtually admits that in regard to the theory of personal criminal responsibility in addition to the responsibility of the State, the proceeding is ex post facto. We go further and contend that except in the case of "conventional" war crimes the law laid down in the Charter is clearly and entirely ex post facto and therefore excluded by the Potsdam Declaration not "stern justice" but the Hitlerite "justice" of vague "popular feelings": the antithesis of justice according to law.

VIII The nature and Purpose of the new doctrine of international law proposed by the Prosecution

The Chief of Counsel strongly urges the Tribunal to create by an unprecedented and historic decision a novel and in his opinion salutary principle in the law of nations that aggressive wars and wars in breach of international law and treaties are international crimes for which persons who acted on behalf of such a State are punishable with all the ignominy of a common felon.

Before importing a proposition so far reaching in effect into the law of nations, we must examine it not merely as an expression of a glowing and irreflective

moral sentiment but as a legal principle as it actually functions, not in the texture of a state or a super-state, but in that of a complicated society of sovereign states.

It is a notorious fact that in time of war "aggressor" is the epithet which each of the belligerents in self-righteousness and for purposes of soliciting public sympathy hurls at the other. When one of the parties is defeated, will the victor ever admit that it was the aggressor and punish its responsible statesmen and warriors? Unless human nature is fundamentally altered, it will always be the defeated nation that will be declared the aggressor and the violator of international law and treaties. A defeated nation has from time in memorial been penalized by the loss of its territory and by the payment of indemnities. Their statesmen and warriors were penalized through the loss of their prestige and their fortunes and by the pain of seeing their beloved country reduced to ruins. To add criminal penalty to all this would only signify a long step further away from that elevated spirit of perpetual oblivion, amnesty and pardon which used to characterize the termination of war in the East as well as in the West.

War as an instrument of national policy is an ambiguous term. National defence may, in a sense, be regarded as one of the most basic elements of "national policy". If war is to be outlawed altogether, and persons who prepare for war, domestic and international, the proposition may be more just, reasonable and calculated to promote world peace. The proposition assumes, however, the coming of a super-state for which the nations of the world may or may not be prepared at the present time. But to add to the "war" to be outlawed the adjective "aggressive" or "in breach of international law or treaties", though sounding reasonable enough in the abstract, is practically fraught with the serious danger of functioning as "a trap for the innocent and a signpost for the guilty."

The Chief of Counsel asserts that the establishment of this principle is necessary for deterring future aggressors. But it is not necessary for that desirable end. For few statesmen will be disposed to make war in the face of probable defeat. And if their country is not defeated, they are unlikely to be penalized. The risks of defeat are terrible enough in themselves to be a most potent deterrent and in the event of victory, penal consequences are no deterrent at all, for the victor will impose them, instead of suffering them. The road to world peace must be sought elsewhere, viz., in international cooperation in the economic and social amelioration of mankind and conciliation of differences between nations, if they occur, in the spirit of amity and justice.

The Chief of Counsel vigorously denies the "small manner objects of vengeance and retaliation." However, persons who have studied the history of World War I may be permitted to recollect that the public passion caused by German Schrecklichkeit created a popular clamor in the Allied countries for the punishment of the authors of the war, and that their leading statesmen could not but respond at least for a time to that popular sentiment. May it not be surmised that history is repeating itself in this respect in World War II and that the Prosecution are doing their very best to give effect to the policy of their respective Governments acting in consonance with similar popular sentiment?

It is, moreover, a dangerous undertaking to alter through a temporary governmental policy any fundamental principle of that body of law which has been developed by civilized nations through centuries of experience tested by reason. It is well know that Karl Schmidt and others in Germany attempted to build up a new international law to suit the political exigencies of the Third Reich. That attempt has generally been looked down upon as unworthy of the glorious traditions of the legal profession, for it meant the subservience of law to politics. Such an attempt, however well-intentioned, is especially to be avoided at a time when war fever still remains unsubsided. For the sake of our posterity, may we not here stop and ponder not only that well-known Johnsonian aphorism, "Hell is paved with good intentions", but Walter Bagehot's not ineptly expressed paradox: "The work of the wise in this world is to undo the mischief done by the good,

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The International Military Tribunal for the Far East symbolises the dignity of the Law of Nations to which not only the accused at the bar, but all the governments of the world must bow in awe. These trials involve on the one hand the policy of the victorious Allied Governments most ably represented by the Prosecution and on the other hand the lives and liberties of the accused statesmen and warriors of a defeated oriental nation or may we perhaps say the rights of man on an international level for the protection o which our American legal friends are here with us. We urge strongly upon the Honorable Tribunal that in rendering its historic judgment in this unprecedented criminal case the sole guide should be the well-established law of nations. An injustice done by imposing severe punishment through ex post facto law for crimes unknown to the law will necessarily be long remembered by posterity and leave such rancour in the hearts of generations to come as may check that permanent reconciliation so necessary for amicable relations between the East and the West and for the peace of the world. It would therefore, be the part of right and discretion for the Honorable Tribunal strictly to abide by the law. By upholding the well-known and well-established principles of international law, and by that alone, the Lamp of Supremacy of Law can be kept ever bright in the community of nations, and shall shine as a fixed beacon, and not as a wandering light for the guidance of a storm-tossed world.

裁判長並ビニ裁判官閣下

ワレワレハココニ、裁判所ノ名ヲ許シヲエテ、首席検察官ガソノ冒頭陳述中ニ開明サレタ本裁判所條例ノ規定ニ關スル解釋ヲ逐一反バクスルタメ該規定ニツイテ論ジタイト思フ。ワレワレハデキルダケ首席検察官ガソノ主張ヲ展開サレタ順序ニ從イ議論ヲ次ノ八項目ニ分ケテスメテユクコトニスル。

一、ポツダム宣言ト本裁判所條例ノ規定

二、共同謀議

三、侵略戰爭

四、條約等ヲ侵犯スル戰爭

五、殺人ノ罪

六、「通例ノ」戰爭犯罪

七、個人責任

八、検察側ノ提議スル新國際法理論ノ性格ト目的

ポツダム宣言ト本裁判所條例ノ規定

ニユルンベルグ裁判ノ判決ハソノ裁判所條例ノ規定ニツイテ次ノゴトク述ベル。

「本裁判所條例ノ制定ハ獨逸國ガ無條件降伏ヲナシタ諸國ノ至上立法權ノ行使ニ他ナラナイ。コレラ諸國ガソノ占領地域ニタイシテ立法ヲ行ウ明白ナ權利ヲモツコトハ、從來文明世界ノ認メルトコロデアル。」

獨逸政府ハ一九四五年五月連合國ノ征服ニヨツテ國際法ニオイテ通常用イラレル用語ニ從エバ、「デバラチオ」ニヨツテ消滅スルニ至ツタ。從ツテ連合國ハソノ完全ナ支配下ニアル地域ニタイシテ主權ヲ行使シウルノデアル。連合國ハ該地域ニオイテソノ思ウガママノ統治ヲ行イウル。イハバ「ルイ」十四世ノヨウナ專制君主トシテ振舞ウコトモデキルノデアル。從ツテ又、裁判所ヲ設ケテ、自己ノ好マザル人物ヲイハユル事後ノ法律ニヨツテ處罰スルコトモ可能デアル。ケダシ、カカル事後立法ヲ行ツテハナラヌトノ法則ハ正義ノ原則デアツテ、必ズシモ連合國ノ主權ヲ拘束スルモノデハナイカラデアル。イナ、サラニススンデ全然裁判ヲ行ハズ行政處分ニヨツテ、コレラノ人達ヲ處理スルコトモ可能ナノデアル。少クトモカクノゴトキ主權ノ行使ハ國際法ノ原則ニ抵觸

スルモノデハナイトイエルデアラウ。ソレ故「(略)戦争ノ計畫、準備モシクハ開始ガ倫敦協定以前ニオイテ、個人的責任ヲ伴ウ國際法上ノ犯罪デアツタカ否カヲ考慮スルコトハ必ズシモ當裁判所ニトツテ必要」デハナカツタノデアル。従ツテ、ニユルンベルグ判決ニオケル、國際法上ノ論議ハ、英米法律家ノイハユル、オビタ、デイクタ、スナハチ附隨的意見トモイウベキモノデアツテ判決自体ニハ必ズシモ必要デナイ論議デアル。少クトモ、ニユルンベルグ判決ハカカル立論ヲソノ論據トスルモノデアル。ワレワレハ、連合國ノ各政府ト日本政府トノ法的關係ハ連合國ト獨逸トノ間ノソレト、マツタク異ル基礎ノ上ニ立ツモノデアルトイウ明白ナ事實ニツイテ、マヅ裁判所ノ注意ヲ促ソウトスルモノデアル。

連合國政府ノ權限及ビ最高司令官トシテ連合國ニヨツテ任命セラレ降伏條項實施ノタメ適當ト認ムル一切ノ措置ヲ執ル權限ヲ附與サレタ、マツカーサー元帥ノ權限ハ、キワメテ廣汎ナモノデアルトハイエコレラノ權限ハ無制限ノモノデハナイ。マツカーサー元帥ハ降伏條項實施ニ適當且ツ必要ト認メラル範圍ニオイテ、至上權ヲ附與サレテイルノニスギイ。ソレ故、ワレワレノ尊ケイスル、イナ愛慕ス同元帥ニヨツテ代表セラレル連合國ノ地位ハ、

十四世ノソレニ似タモノデハナク、ムシロ、ウキリアム及ビメリーノ如キ近代立憲君主ノソレニ類似スルモノデアル。

カカル獨逸ト日本トノ法的地位ノ根本的相違ハ、モトヨリ休戰ニ至ツタソレノ經緯ノ相違ニ基クモノデアル。日本ハ獨逸ト異リ、降伏當時未ダ連合軍ノジユウリンスルトコロニナツテハイナカツタ。日本本土ハ未ダ占領サレテイナカツタ。ナオシバラクハ武力抵抗ヲ行ツテ連合軍ニ損害ヲ與エウル立場ニアツタ。カカル狀況ノ下ニオイテ、日本政府ハ連合國ノ和平申入レヲ受諾スルコトニ同意シタノデアル。ソシテ受諾ノ條件ハポツダム宣言ノ條項ニ示サレテオル。降伏文書自体モポツダム宣言ノ條項ヲ援用シテイル。スナハチ「下名ハココニ『ポツダム』宣言ノ條項ヲ誠實ニ履行スルコト並ニ右宣言ヲ實施スル爲連合國最高司令官ノ要求スルコトアルベキ一切ノ命令ヲ發シ且カカル一切ノ措置ヲ執ルコトヲ、天皇、日本國政府及ソノ後繼者ノ爲ニ約ス」。又、「天皇及日本國政府ノ國家統治ノ權限ハ本降伏條項ヲ實施スル爲適當ト認ムル措置ヲ執ル連合國最高司令官ノ制限ノ下ニ置カルルモノトス。」トアルノガレデアル。

連合國ニタイスル日本國ノ義務ガ無制限ノモ

ナク、ポツダム宣言ノ條項ニ限ラレテイルノデアルナラバ、獨逸ノ場合ト異リ、連合國各政府ガ日本ニタイシテナシウル要求ニハ一定ノ限度ガアルワケデアル。日本ハコレラノ制限ノ遵守ヲ要求スル權利ヲ有スル。サウダトスレバ、連合國ニオイテモマタ遵守セザルベカラザル、コレニ對應スル義務ガ存スルコトニナル。何故ナラオヨソ法律關係ハ一方的ナルコトヲエナイカラデアル。ソシテカカル相互的ナ權利及ビ義務ノ準據ハポツダム宣言ノ條項中ニ示サレテイルノデアル。

極東軍事裁判所ニオケル今次ノ裁判ノ法的根據ハポツダム宣言中ノ「我等ノ俘虜ニ對シ殘虐行爲ヲナシタル者ヲ含ム一切ノ戰爭犯罪人ニ對シテハ、シユン嚴ナル裁判ガ行ハルベシ」ナル條項ニ存スル。

（以下次頁）

甲「戰爭犯罪」

サテ、本訴訟ノ現段階ニオイテハ、裁判權ノ問題トシテデナク別ノ觀點、スナワチ條例ノ規定トイウ點カラ、前掲章句中ノ「戰爭犯罪」ナル辭句ノ解釋ニツキ裁判所ノ御考慮ヲ促シタイ。

(一)「戰爭犯罪」及ビ「戰爭犯罪人」ナル言葉ハ、國際法ニオイテスデニ充分ニ確立シテヰル法律術語デアル。オツペンハイムニヨレバ、戰爭犯罪トハ軍人ソノ他ノ個人ノ行爲ニシテ、敵國ガ犯行者ヲ捕エタ場合、處罰スルコトノデキル敵對行爲ソノ他ノ行爲ヲイウノデアル。コノ場合戰爭犯罪ナル言葉ハ道德的意味ニデハナク。技術的ナ法律上ノ意味ニ用イラレテイル。ソレハ武裝軍隊ノ一員及ビソレ以外ノ者ガ交戰ニ關スル從來認メラレタ特定ノ法規ニ違反スル行爲ヲソノ内容トスルモノデアツテ、俘虜ノ虐待、武裝軍隊ノ構成員ニアラザル個人ガ武器ヲ執ツテ行フ一切ノ交戰行爲、間諜、戰時叛逆及ビ掠奪ヲ含ムモノデアル。戰爭犯罪ハ戰時中、又特ニ戰場ニオイテ、犯サレル行爲デアリ、通常軍事裁判所ニオイテ簡易手續ニヨツテ處斷サレル。

イハユル「戰爭犯罪」ノウチニドンナ種類ノ行爲ガ含マレルカニツイテハ、學者ノ間ニ多少ノ意見ノ

相違ガミラレルトシテモ、戦争勃發前ニ爲サレタ行爲ハタトイ戦争ト歴史的關連ヲ有スルモノデアッテモ、コレニ入ラナイコトハタシカデアル。カクノ如キ法律專門語カ外交文書中ニ用イラレテイル場合ニハ、他ニコレト異ル趣旨ガ示サレテイナイカギリ、法解釋ニ關スル周知ノ準則ニ從ッテ、ソノ術語ノ意味ニ即シテ、コレヲ解釋シナケレバナラナイ

(二) 右ノ解釋ハ、前掲章句ノ後ニ續ク「我等ノ俘虜ニ對シ殘虐行爲ヲ爲シタル者ヲ含ム」ナル辭句ニヨッテ、サラニ理由づケラレル。俘虜ノ虐待ハ術語上ノ意味ニオケル「戰争犯罪」ノ一ツノ型態ニスギナイ。

ポツダム宣言ニイワユル「戰争犯罪」ガカカル通常ノ既ニ認メラレタ意味ニ用イラレタモノデアルコトハ、該宣言ガ俘虜ノ虐待（オソラク非戰鬪員ニヨル場合ヲモ含メテ）ノ如キ戰争犯罪中ノ特定種類ノモノヲ包含セシメントシテ、ソノ點ヲ表示スルコトニ意ヲ用ヒ、ワザワザ右行爲ガ戰争犯罪中ニ含マレルムネ特記シテイル事實ニヨッテモ明ラカデアル。モシイワユル「平和ニ對スル罪」及ビ「人道ニ對スル罪」ヲモコレニ含マシメントノ趣旨ナラ俘虜ノ虐待テハナク、ソノコトコソコレヲ包含スルムネガ特記サレタデアラウ。

(三)右ノ解釋ハ、連合國政府及ビソノ指導的地位ニアル者ガ樞軸國ニタイシテ發シタタイワユル「警告」ニツイテモノヲ照合考察スルコトニヨツテ、サラニ理由ガケラレル。

各國政府及ビソノ指導者等ガ爲シタ宣言及ビ演說ヲ注意深ク吟味スルナラバ、彼等ガ樞軸諸國民ガ犯シタト稱スル犯罪ニ言及シテイル場合、常ニ戰爭中ニ爲サレタ行爲、例ヘバ占領地ノ一般國民ニ對スル虐待行爲トカ、俘虜ノ虐待トカノ行爲ヲ指シテ述ベテキルコトガ明ラカニナルデアラウ。ワレワレノ知ツテキルカギリソレラノウチ一トシテイワユル平和ニタイスル罪ニ關レテイルモノハナイ。一九四三年十一月ノ「モスコー」宣言ニオイテ「其ノ犯罪ガ一定ノ地域ニ限定セラレザル重大戰爭犯罪人」ニ言及シタ場合ニオイテスラ、ソノ文意カラ判斷スレバ、ソノイウトコロハ前者スナハチ戰爭中ニ爲サレタ行爲ニ關連スルノデアツテ、後者スナワチ平和ニタイスル罪ニ關連スルノデハナイ。

コノ點ハハーヴアード・ロオ・スクールノシエルドン・グリニック敎授ノ「ニユルンベルグ裁判ト侵略戰爭」ト題スル論文中ノ一節バーヴアード・ロウ・レヴユー第五十九卷、一九四六年四月號、

第三百九十七頁）ニヨツテ一層強ク證明セラレル。

教授ハイウ。

『從來公刊セラレタ諸國ノ資料ノウテ現在利用シウルモノニ基イテ判斷スレバ、樞軸諸國ガ實ヲ負ウベキ犯罪ノウチニ、侵略戰爭ノ開始ト「平和ニ對スル罪」トヲ含マシメントスル考ヘハ、米國ノ政策ニ關スル限リ、重大戰爭犯罪人訴追ノ米國代表首席檢察官ガ、一九四五年六月七日大統領ニダイシテ爲シタ報告書ニ由來スル。ロバート・ジャツクソン判事ハ右報告書中ニオイテ、今ヤ侵略戰爭ヲ爲スコトガ違法ニシテ且犯罪ヲ構成スルトノ法的原則ニ基イテ行動スベキ時ハ來シタト述ベテイル。』

同ジ頁ニ掲ゲラレタ註ノ中デ、グリユツク教授ハ次ノ如ク告白シテイル。

『筆者ノ著書タル「戰爭犯罪、ソノ訴追ト處罰」（一九四四年）」中デハ、未ダ筆者ハ侵略戰爭ノ開始遂行ノ行爲ヲ國際犯罪トナシウルヤニツイテ全然確信ヲモタナカツタ。筆者ハ主トシテ一九二八年巴里ニオイテ調印セラレタ戰爭ノ拋棄ニ關スル條約（ブリアン・ケロツグ條約）ノ最終解釋ニ基イテ、コノ問題ニタイシ消極的結論ヲ下シタガ、ソレハ又實際的ナ政策ノ考慮

ニヨリテモ形成セラレタ。戦争ノ法規慣習ニ関スル周知ノ原則及ビ海牙條約、毒瓦條約ニ照シテ指導的ナナチノ軍人ドモノ責任ガ明白デアッタノデ、調印ノ余地アル理由ヲ含ミ、且裁判手續ニ遅セザル長期間ノ正史的調査ヲモ要シカネナイ侵略戦争ノ「罪」ニ關スル起訴ノ如キハ、従ラニ不必要且危険ナ紛糾ヲ招クダケデアルト考ヘタノデアル」ト。

「アーネスト・デイー・ハウザア」ノ「ニユルンベルグノ縛台裏」（「サタデー・イーヴニング・ポスト」誌海外版、一九四六年二月號所載）ニハ、六週間ニワタル倫敦英蘇ニオイテ「ジヤックソン」判事ノ斬奇ナ考ハ聯合國代表ノ反對ニアヒ倫敦協定ニ具体化セラレタ政策ニツキ最後ニ意見ノ一致ヲ見タノハ漸ク八月八日ノコトデアッタト書カレテキル。右ノ外モ「ニユルンベルグ」裁判ニ關シテ爲サレタノデアッテ、聯合國政府ガ東京裁判ニツイテモ同様ノ方針ヲトルコトニ一致シタノハオソラクソレヨリ後ノコトト考ヘラレルノデアル。

「ポツダム」宣言ハ一九四五年七月二十六日發セラレタ。米國ノグリユック教授ハ一九四四年ニオイテ、侵略戦争ヲ起シタ者ドモヲ處罰セントノカレノ願望ヲ周知ノ言葉ヲ以テ表スルコトヨッテ消シウルカドウカニツキ大イニ惱ンデイタ。

ジヤクソン判事ハ一九四五年ニオイテ、カカル権限ガ全ク斬新ナコトデアルコトヲ認メテイルノデアル。ソシテ右傍句ヲ擴張シタ連合国ノ政策ハ長期ニワタル両戦ノ後ニ一九四五年八月八日ニ至ツテ初メテ決定セラレタノデアル。然ラバ同年七月二十六日ノポツダム宣言中ノ傍句ヲバ、カカル擴張セラレタ意味ニ解釈スルコトハ不可能デアルトイハネバナラナイ。

(四) 右ノヤウナ争ハスラザル証拠ニモ拘ラズ、ナオ最分デモ裏面ノ余地ヲ残シ、戦争犯罪ナル語ハ不明確デ二様ノ意味ニトラレウルト判所ニオイテオ考ヘニナルナラ、ワレワレハカノ周知ノ解釈規則ニツイテ裁判所ノ御注意ヲ促シタイ。イワク。「不明確ナ文書ハコレヲ作成セル者ニ不利益ニ解釈スベシ。」「字句ハムシロソノ提供者ニ不利ニ解セラレネバナラヌ。」

(以下次頁へ續ク)

乙「裁判」

ポツダム宣言ハ「「シユン殿ナル裁判」」ガ行ハルベシ」ト述ベテイル。行ハルベキ裁判ハソレガイカニシユン殿デアリ、慈悲ニヨツテ寛和サレナイニセヨ、トニカク「裁判」デナケレバナラナイ。

文明國ニオイテハ、裁判ハ法ニヨル裁判ヲ意味スル。スナハチタトヘ裁判官ガイカニ善良デアリ又聰明デアツテモ、ソノ裁判官ノ個人的ナ正邪ノ念モシクハ政治的依怙贔屓ニヨルコトナク確立サレタ法ノ規則及ビ原則ニヨツテ裁判ヲ行フベキコトヲ意味スル。

本裁判所ガ單人デナク連合國國民中カラ選バレタオハメテ著名ナ法律家ニヨツテ構成セラレテイル事實ハ、連合國自身、又法ニ從ツテ右ノ「裁判」ヲ行ハントノ意圖ヲモツコトヲ裏書キスルモノデアル。

特ニ刑事裁判ニオイテハ、裁判ハ確立セル法規ニ則ツテ行フベシトノ準則ノ正シイコトハ、多年ノ政治的ソノ他ノ經驗ニヨツテ既ニ試驗濟ミデアル。英國ニオケル昌法流ノ歷史ハ、刑事法ノ機構ガ、時ノ權力者ニヨツテ反對派ノ政治集団、モシクハ政治家ヲ抑壓スルタメニ利用サレヤスイコトヲ證明シテ餘リアルモノデアル。事後法禁止ノ法則ハスベテノ文明國ニオイテ刑事裁判ノ準則トシテ承認セラレテイ

ル。ソシテコノ準則ハ政治犯罪ニ關スル事件ニオイテハ、特ニ尊重セラレナケレバナラナイノデアル。

英國議會ハソノ絕對的權力ニモカカハラズ一六八八年以降ニオイテハ、政治犯人ヲ處罰スルタメ事後立法ヲ行ツタコトハナイ。又「アメリカ」合衆國憲法ハ、州法デアルト聯邦法デアルトニカカハラズ、ヒトシク事後法ヲ禁止シタ。ソシテ「アメリカ」ノ立法史ヲ通ジテ、政治犯ニ關スル事後立法ハキハメテ稀ノヤウデアル。南北戰爭後カヨウナ事後立法ガ爲サレ、南部聯邦ヲ援助シタ者ヲ罰スル州法及ビ聯

[illegible]

關シタコトガアルガ、同裁判所ハ當時ノ與論セル民衆感情ノタダ中ニアツテ、「フイールド」判事ヲ通ジ州法聯邦法トモニ違憲デアルト判示シ、ソノ歷史ニ永遠ノ榮光ヲソヘタノデアル。一九四四年二月二十四日「アメリカ」法學協會ニ對シテ爲サレタ基本的人權ニ關スル報告書第九條ニハ、「何人ト雖モ犯罪トシテ訴追ヲ受ケタル行爲ガ其ノ行爲ノ當時施行セラレタル法律ニ違反セザルカギリ有罪ノ宣告ヲ受クルコトナク又犯行當時科シ得タル刑ヨリ重キ刑ヲ科セラルルコトナシ」トアル。ソシテコノ原則ハ實質上三十ケ國ノ憲法ニ含マレテキルトイフコトデアル。「法律ナケレバ刑罰ナシ」トイフ原則ハ實ニ、

憲法上ノ保障ノ有無ニカカハラズ、大陸法系諸國ニオケル刑事司法ノ基本原則ノ一ツヲナシテヰル。ナルホドコノ原則ハ、「ナチ」ノ如ク乙ニオイテ、裁判官ニタイシ「健全ナル國民感情」ニ從ツテ事件ヲ裁判スル權限ヲ付與シタ一九三五年六月二十八日ノ法律ニヨツテ無効ニモウチヤブラレタ。當該國際司法裁判所ハソノ勸告的意見ニオイテ、コノ「ヒツトラー」立法ヲ「ダンチツヒ」ニ適用スルコトハ、同市ノ統治ハ法ノ支配ニヨルベシ（法治國レヒツ・シユタート）トノ要件ニ違反スルモノデアルト宣言シタ。周知ノヤウニ、獨乙人ハ國會放火ノ故ヲ以テ、該火災ノ當時ニオケル放火罪ノ刑ハ有期懲役刑ニスギナカツタニカカハラズ「ヴアン・デル・ルツベ」ノ斬首ヲ許シタ。ソシテコノコトハ、極東ノ島國人ヲフクム全世界ノ法律家ノ良心ニ衝撃ヲ與ヘタノデアル。又「シヤイム」ノ裁判所ガ一九四六年三月二十四日戰爭犯罪人處罰ニ關スル新シイ法律ハ事後法デアリ、遡及的ニ適用スルコトヲ得マイトイフ理由デ「ビブン」元帥及ビ今次戰爭中日本ト協力シタ十一人ノ主要「戰爭犯罪人」ヲ無放シタトノ報道ガ眞實ナラ、ソレハマサニ「シヤイム」裁判所ニ光榮ヲ與ヘルモノデアル。事後立法ハ裁判ノ根面ヲカブツタ私刑ニ他ナラナイトイフ感情ハ欧洲ニオケル開明期ノ所産デハナク、「ネ

ロ」カラ「ヒツトラー」ニイタル暴言ニヨツテ屢々ヤブラレハシタガトニカク東西古今ヲ通ズル普遍的ナ正義観念ヲアラハスモノデアル。

ワレワレハ、共同謀議ノ罪、イハユル平和ニ對スル罪及ビ人道ニタイスル罪（「戰爭犯罪」ノ一部ヲナス事件ハ別トシテ）ハ未ダ國際法ノ認メザリシトコロデアツタト主張スル。カリニソレガ戰時中ニ各國民ヲ拘束スル法トナツタトシテモ、同志ノ行爲ガナサレタ當時ハ未ダ法デハナカツタノデアリ、ソレハ明ラカニ東洋ニオイテモ西洋ニオイテモ均シク不當トサレテイル事後法デアル。カクノ如キ法ヲ被告人ニ適用スルコトハ、文明的裁判デハナク、又ポツダム宣言ノイワユル「裁判」デモナイ。

一方ニオイテハ戰爭犯罪ナル語句ノ自然ナ解釋ニモトヅキ、他方ニオイテハ文明的ナ裁判ノ一般的概念トニ照シテ、ワレワレハ本裁判所條例中ノ共同謀議、「平和ニ對スル罪」及ビ「人道ニ對スル罪」ーソレガイワユル「戰爭犯罪」中ニ包含セラレザル限リーヲ規定スル部分ハ本裁判所ノ適用スベキ法デハナイト主張スル。アタカモ連邦議會法律中合衆國憲法ニ違反スル部分ヤ、英國ノ勅令中議會制定法ニヨツテ委任セラレタ範圍ヲ踰越スル部分ガ無效デアル如ク、本裁判所條例中デ基本文書ー即チ降服文書中

ニモソノ條項ガソウ入サレテイルトコロノ[illegible]ス
宣言ニ違反スル部分ハ無效ト宣言セラレネバナラ
ヌ。當事者ノ一方ガ約諾シタ義務ハ、相手方ニオイ
テ勝手ニコレヲ加重シエナイコトハ、法ノ一般原則
デアル。國家間ノ條約ヲ、當事者ソウ方ガ誠
格ニ遵守スルコトハ誠意ト友好トニ基礎ヅケラレタ
國際關係ノ不可缺ノ條件デアル。

（以下次員ニ讓ク」

二、共同謀議

首席檢察官ハ、共同謀議ヲ犯罪トスル理論ガ、國際法上ノ一制度デアルト明言シテハイナイ。然シ首席檢察官ガコノコトヲ前提トスルノデアルコトハ、「本裁判所條例中ノ本項ノ規定ハ別ニ新シイ法ヲ創設シタモノデハナイ」（英文八頁）ト述ベテイルニ徹シテ明白デアル。右ニイワユル「法」トハ「國際法」ヲ指スノデアル。シカシコノ場合ニハ侵略戰爭ノ場合ト異ツテ、首席檢察官ハ多數國家ノ參加シタ會議ニオイテ、共同謀議ガ國際法上ノ犯罪デアルコトヲ認メタ事例ヲ一ツモ擧ゲテオラナイ。又共同謀議ヲ犯罪ト定メタ條約、宣言乃至決議ノ如キヲモ擧ゲテイナイ。タダ單ニマリノ對合衆國事件ニオケル合衆國連邦控訴院ノ見解ヲ引用スルニ止ル。ソシテソレカラ次ノ如ク結論スル。

「本犯罪ハ大多數ノ文明國ノ熟知シ且承認スルトコロデアリ、ソノ性質ニオイテハ各國トモキワメテ類似シテイルノデ、本犯罪ノ概念ヲ適切ニイイアラワシタモノトシテ、合衆國ノ連邦裁判所ガ下シタ定義ヲ採用シテモ差支ナイト思ハレル」ト。

コレハ誠ニ驚クベキ誤論デアル。比較法ニ志ス法律家ナラ、共同謀議ヲ犯罪トスル原則ガ英國法制史獨特ノ所産デアルコトヲ知ツテイル。ソレハ恐ラク

他ノ法体系ニトッテ未ダノ刑法理論デアリ、スクナクトモ國際的ニ妥當スルタメニハ全テノ法体系ノ認メルトコロデナケレバナラナイニ拘ワラズサウデナイコトハタシカデアル。

△「フランシス・ビーリー・セイヤー」教授ハ、「共同謀議ノ理論ハ變則的、地方的ナ理論デアルト共ニ、謀議ノ理論ハ變則的、地方的ナ理論デアルト共ニ、諸國ノ法典ニモ見當ラナイ。大陸ノ法律家デ、カヨウナ理論ヲ周知シテイルモノハマレデアル。」ソノモタラス結果モカンバシカラヌモノデアル。

ト述ベテイル。議會政治ヤ、法ノ支配ヤ刑事陪審ヤ羅馬法ハカヨウナ理論ヲ知ラズ、又ソレハ現代大陸人身保護令狀ヤ信託ノ場合ト異リ、大陸法系ノ法律家ハコノアングロ・サクソン獨特ノ制度ヲ余リ高ク評價シテイナイ。尚ニ十三頁ニ述ベラレテイル「共同謀議者ノ全テガ外部行爲ニ參加スル必要ハナイ。ソノ一人ガカヽル行爲ヲナセバ、ソレハ全員ノ行爲トナル。」トイウ理論ノ如キハ明ラカニ不當デアリ、イチヂルシク法的良心ニ反スルモノデアル。

大陸法系ノ法律家ハ、右ノゴトキ理論ハ人類ノ部族時代ニ行ハレタ集合的責任主義ニ逆戻リスルモノトノ感ヲ抱カザルヲ得ナイデアラウ。シカモカヽル理論ヲ一切ノ平和ニ對スル罪、戰爭犯罪及ビ人道ニ對スル罪ニ推シ及ボサウトスルノデアルカラ、益々

以テ不當デアル。何故ナラ右ノ理論ニヨレバ、
度アル戰爭ガ侵略戰爭又ハ國際法モシクハ條約ヲ
侵犯スル戰爭ト宣言セラレレバ、自國ニ對シテ戰
時的奉仕ヲ爲シタ者ハスベテ、他人ガ犯シタ殺人
ソノ他ノオソルベキ犯罪ニツキ、タトヘ何時、何
處デ、誰ガカヽル罪ヲ犯シタノデアルカ全然知ラ
ナクテモソノ責任ヲ負ハネバナラヌコトトナルカ
ラデアル。

英米ノ法律家自身大陸法系ノ法律家ニタイシ、
共同謀議ノ理論ハ、時ノ權力者ノ好マザル集團ヲ
處罰スルニ熱心ナ檢察官ヤ裁判官ニトツテ誠ニ便
利ナ法律上ノ武器デアルト語ツテイルノデアル。
カレラハ又、英國ニオイテハコノ理論ガアダム・
スミスノ「富國論」ニ指カレテイルヨウニ、十八
世紀ニオイテ、又シドニ ウエツブノ指摘スル樣
ニ、十九世紀ノ前半期ニオイテ、當時ノ支配階級
ニ好マシカラザリシ社會的集團テアツタ勞働組合
ノ組合員ヲ處罰スル爲有效ニ利用サレタトイウデ
アラウ。サラニ進ンデ又英語國ニオイテモ進歩的
ナ裁判官ヤ法學者達ハ、コノ理論ヲ英米普通法ニ
光彩ヲ添エル裝飾トシテ値スルモノテアルト考エ
テイナイトイウノデアル。

ハーヴアード・ロウ・スクールノフランシス・

ビー・セイヤー教授ハ本問題ニツイテ綿密ナ研究ヲナシタ後デ次ノ如ク述ベル。

「カヽル原則ノ下ニオイテハ、何人トイエドモ他人ト協力シタ場合後日自己ノ自由ガ、未知ノ裁判官ノ豫斷的ナ好惡ヤ社會的偏見ニヨッテ左右サレルコト、ナリカネナイノデアル。カクノ如キハマサニ法ニヨル裁判ノ逆デアル。」

「ソノ輪郭極メテアイマイ、ソノ根本性格ー頗ル不明確ナコノ理論ハ法ニタイシナン等ノ力モ光輝モ添ヘルモノデハナイ。ソレハ紛レモナク、ネコノ眼ノヨウニ變ル意見ヤ生硬ナ思想ノ浮砂ニ人ヲマキ込ム理論デアル。」

「共同謀議ノ理論ハ、ソノ用イラレル全テノ場合ニオイテワガ英米法ノ中ノ魔魂ナルコトヲ實證シタ理論デアル。ワタクシハコノ理論ガ、過去ノ判例ノ間ニヒシメク亂影ニスギナクナル時代ノ近カランコトヲ祈ルモノデアル。」

カクモ嫌惡スベキ理論ヲ國際法ノ活舞臺ニ導入セントノ提議ニタイシ英國ノ故キロウエンノラッセルキヨウヤ、米國ノ故オリヴアー・ウエンテル・ホームズ・ジユニア判事ノ如キ偉大ナ法律家ハ果シテナントイウデアロウカ。

大陸法系ノ法學者ニトッテ特ニ奇異ナノハ首席

檢事官ガ「進行的共同謀議」ト命名シタ共同謀議理論ノ應用形式デアル。

ドイツノ第三帝國ノ場合ト異リ被告人ガ「相互ニ意見ノ合致セル統一體」ヲ形成シテイタコトヲ證明スルコトハ勿論不可能デアリ首席檢察官モ又「被告人ノ間ニハ意見ノ銳イ對立ト烈シイ爭ヒガ存シタモノノ如クデアル」コトヲ認メル。シカモナホ首席檢察官ハ該ニ檢察官ラシク岩石ノウチニ教訓ヲ讀ミトル態度デ國家ノ軍備ヤ國家利益ノ保護ノタメノ武力行使ヤ戰爭トイフ慣行ガ未ダ過去ノ遺物トナツテヰナイ世界ニオケル國民ノ國際的經歷ニアラワレル一切ノ發展的爭意ノ中ニ共同謀議、イナ擬制的共同謀議ヲ發見シヨウト努力スルノデアル。モシモ首席檢察官ノ論理ガ正シイモノトスルナラ英、佛、關各國ノ彭湃ノ中ニモロシア帝國ノ發展ノ中ニモサラニ又アメリカノ原始十三州カラ現在ノ偉大ナアメリカ共和國ヘノ漸次的發展ノ中ニモ同ジヨウニ進行的共同謀議ヲ認メソレ等諸國ノ主要ナ政治家及ビ軍人ハ右ノ共同謀議罪ニツキ責任ヲ負ウモノト論スルコトモ出來ルワケデアル。

ニユルンベルグ判決ハナチ黨セシクハナチ政府ノ活動ニ重要ナ關與ヲ爲シタコトガ犯罪トシテノ

共同謀議ノ證據トナルモノデアルトイヒキルコトヲ躊躇スル。同判決ハ「共同謀議ガ成立スル爲ニハソノ違法ナ目的ノ輪カクガ明ラカニナツテイナケレバナラズ又謀議成立ノ時ガ決定及ビ行爲ノ時カラ餘リ遠クテモイケナイ」トイツテイル。コレハ確カニ共同謀議ノ理論カラ無實ノ者ヲ陷レルニハ便利ナガラ法律的良心ニ衝撃ヲ與エルモツトモイマワシキ部分ヲ取リ除イタコトニナルノデアルガ同判決ハ共同謀議ノ理論ソノモノハコレヲ排斥シナカツタ。シカシニユルンベルグノ裁判所ニオイテハ裁判所條例ノ規定ハ英國ニ於ケル諮會制定法ノゴトク絶對的ニ裁判所ヲ拘束スルト考エラレテイルノニ對シ極東國際軍事裁判所ニオイテハ條例ノ規定ハ「アメリカ」ノ議會制定法ト同ジクヨリ高次ノ法スナワチポツタム宣言中ニ嚴肅ニ明定セラレタ條項ニ從ワネバナラヌノデアルコトニ留意セネバナラナイ。

ソシテワレワレハニユルンベルグ判決ニオイテ「平和ニ對スル罪」ニ對シ適用シタ如キ緩和サレタ形態ニオイテモナホ共同謀議ノ理論ハ行爲ノ當時國際法上ノ制度テハナカツタコトイカナル國際法學者モ恐ラク一九四五年六月マテハカカルコトヲ夢想ダモシナカツタノダト主張スルノデアル。

三侵略戰爭

首席檢察官ハ次ニ「侵略戰爭」ヲ論ズル。マヅ「侵略戰爭ハ國際法上ノ犯罪デアリ、起訴狀ノ言及スル全期間ヲ通ジテ、カカル犯罪ト考ヘラレテイタデアラウカ」ト訊問シ、コレニ對シ首席檢察官ハ然リト答ヘル。ソシテ「一ツニハ　コノ問題ニ關スル國際法ガ存スルコト、二ツニハ、ソレハカカル法ニヨリ犯罪トサレテイルコト」ノ二ツノ點ヲ證明セントスル。

首席檢察官ハマヅ最初ニカルドオゾ判事ヤ、ライト卿ヤ、サー。フレデリツク・ポロツクヤ、福密院司法委員會ヤ、常設國際司法裁判所規程ヤ、米獨混合仲裁委員會ノ裁決等ノ如キ尊重スベキ權威ガ慣習ニヨル國際法ノ發展トイフ點ニツイテ披レキシタ一般的見解ヲ引用シテイルガ、慣習ノ問題ニ關スルコレラノ見解ハモトヨリ大部分ハ國際法學徒ナラ誰デモヨク知ツテイル月並ナ意見ニスギナイ。

次デ首席檢察官ハ、次ノ如ク結論スル、

「一ー一以上ニヨッテ多數ノ文明國ガ、全体ノ福祉ニ關スル事項ニツイテ一定ノ行動ヲトレバ、ソレハ國際法ノ原則トシテ認メラレルニイタルモノデアルコトガ證明サレタノデ、今ヤ侵

略奪ノ問題ハ極メテ多数ノ國家ニヨリ考慮サレ、ソノ結果違法トサレタノデ、ソレラ國家ノ全員一致ノ評決ハ法ノ一般原則タルノ權威ヲ荷ウニイタツタコトヲ證明スルデアラウ」ト。

ナルホド上述ノ尊敬スベキ諸權威ノ見解ヲ援用スルコトニヨツテ、首席檢察官ハ、一ノ歴史的過程トシテハ多数文明國ノ一致シタ行動ガ國際法ノ原則ヲ確立スル傾向ノアルコト、及ビ國際裁判所ハ一定ノ國際法ノ法源ヲミトメテヲリ、ソノナカニハ國際慣習モ含マレテヰルコトヲ證明シタモノト言ヘルデアラウ。然シ全体ノ服從ニ關スル事項ニツイテノ多数文明國ノ一致シタ行動ガ、單ニソレダケノ事實ダケデ國際法ノ一般原則ヲ確立スルモノデアルトスル法的原則ハナンラ證明サルテヲラズ、又證明スルコトヲ得ナイノデアル。又首席檢察官ノ援用シタ諸權威ハ、カクノ如キ法理ヲ樹立セントスル趣旨デモナイ。例ヘバ有名ナ巴里宣言ヲトツテミヨウ。

「商船私掠ハ今後之ヲ廢止ス」トイフノガ、海法ニ關シ一八五六年ノ巴里會議ニオイテ採擇サレタ宣言ノ一部ヲナシ、[illegible]北米合衆國スベイン及ビメキシコヲ除ク全テノ文明國ガ右宣言ノ調印國トナツタ。然ラバ多数文明國ニヨツテ

為サレタル一八五六年ノコノ宣言ハ、商船私掠ノ禁止ヲ国際法ノ原則ニマデ高メタルノデアルカ。右宣言ハスベテノ国際法学者ニヨッテ、単ニ調印国相互間ニオイテノミ拘束力ヲモチ、各ノ三ケ国ニヨルモシクハコレニタイスル商船私掠ハ違法デアルト認メラレタルノガ事実デハナイカ。

一八九八年合衆国政府ハ、今後商船私掠ヲ行ハズ右宣言ノ規定ヲ遵守スル旨ノ意思ヲ表明シタ。コノ事実ハ、カヽル意思表示ナキカギリ合衆国ハ商船私掠ヲ行ハザル義務ナカリシモノナルコトヲ示スモノデハナイカ。又スペインガ拿捕免許状ヲ授スル権利ヲ固守シタトキ、ソレハ正当ナ行為デアリナンラ国際法ノ原則ニ反シタモノデハナイトサレハシナカッタカ。

サラニ又一九二九年七月二十七日ノ俘虜ノ待遇ニ関スルジエネヴア條約ハ、多数ノ文明国ニヨッテ調印セラレタ。何ヘバソヴイエット聯邦ハ、該條約ノ規定ハ国際法ノ一般原則ヲ具現シテヰルモノトシテ、日ラモコレニ拘束ヲ受ケルト考ヘテヰルデアラウカ。

シカルニ首席検察官ハアヘテ、前記命題ヲ以テ歴史的ナ意ノ商慣トシテデナク、法的原則トシテモ妥当スルコトヲ証明スルヤウデアル。ソシテカ

カル而提ニ至イテ、多クノ国際條約ヲ援用シ、コレラノ條約ニヨッテ日露戦争ガ既ニ久シイ以前カラ国際法上ノ犯罪デアッタコトヲ證明シウルト主張スル。

(一)首席檢察官ガ第一ニ援用スル條約ハ第一次海牙條約デアル。首席檢察官ノ考ヘテキラレル各規定中ノ「成ルベク」トカ「事情ノ許ス限リ」トカノ語句ハ、首席檢察官ノ主張トハ反對ニ、国カノ印国ガ未ダ国際紛争ヲ平和的手段ニヨッテ解決スベキ法的義務ヲ負フダケノ用意ナカリシコトヲ示シテキル。又事實上正當防衛ノ考慮ハ、條約国ノ右ノ如キ法的義務ノ受諾ヲ許サナカッタデアロウ。コノコトハ例ヘバ本起訴狀附屬書A第十節ノ和国ノ主張ニ「從ッテ和国政府ハ、最後ニ述ベタ攻撃ヲ受クルヤ直ニ自衛ノ爲日本ニ對シテ宣戦シタ」ヲ見テモ明カデアル。

(二)首席檢察官ガ次ニ援用スル條約ハ第三海牙條約デアル。首席檢察官ハ、右協定ニヨッテ開戦ノ宣言ナキ戦争ハ国際法上ノ犯罪ヲ構成スルラク印ヲ捺サレタモノト主張スル。シカシコレハ勿論、首席檢察官ノ誤解デアル。

開戦且事前ノ通告ナクシテ戦争ヲ開始スベカラザルコトヲ認メタ本條約ハ、主トシテ戦争狀

意ガ何時ニ發生シタルカヲ明瞭ナラシムルノ
ニソレガ望マシイトイフ。比較的重要ナラザル
技術的規定デアル。右通告ト戰爭開始トノ間ニ
二十四時間ノ期間ヲ設クベシトノ和蘭ノ提案ガ、
本會議ニオイテ否決サレタ事實ハ、コノコトヲ
物語ルモノデアル。背信トイフコトハ主トシテ
良心ノ問題デアリ、戰爭ハ開戰宣言ノ有無ニ拘
ハラズ背信行爲タリ得ルモノデアル。「グロテ
イウス」ハ、早クソノ古典的著述ノ中デ、「洋
ノ東西ヲ問ハズ古代及ビ中世ノ社會ニオイテハ、
開戰ノ宣言ハ武士道ト謂遖スルモノデアツタ」
ト述ベテイル。カカル武士道ノ觀念ハ、今日ニ
オイテモ一般人ノ感情ノウチニ生キテヰル。ソ
シテ周知ノ如ク、戰時宣言者ハ敵國ヲ「不信」
呼バハリスルコトニヨツテ一般人ノ感情ヲ百パ
ーセント利用スルモノデアル。シカシ「グロテ
イウス」ハ語ヲ改イデ言フ、「國民ガ違法ナ
戰爭開始ノタメニ開戰ノ宣言ヲ要スルモノトス
ルニ至ツタ理由ハ、二、三ノ論者ノ主張スルヨ
ウニ、秘密裡ニ事ヲ運ンダリ、巧妙ナ謀計ヲ用
ウルコトヲ禁ズルタメデハナイ。ケダシ若干ノ
國民ハ戰イノ時ト場所ヲモ指定シタトイハレル
ヤウニ、カカル問題ハ法ノ問題デハナク、ムシ

ロ武士道ノ問題デアルカラデアル。サウデハナク、ソノ理由ハ戦争ガ私人ニヨッテ取手ニ行ハレルノデハナク、双方ノ国民モシクハソノ元首ノ意思ニヨッテ行ハレルノデアルコトヲ明確ナラシメントスルニアツメノデアル。何故ナラ開戦宣言ハ敵成国士ノ争ヤ国王ト国下ノ間ノ国争ノ場合ニハ生ジナイヤウナ特殊ナ效果ヲ生ゼシムルカラデアル」

以下次頁

近代國際社會ニオイテ開戰ノ宣言ヲ望マシイト考ヘル主ナ理由ハ、モハヤ武士道デハナクーコレハ主觀的良心ノ問題デアル。戰爭狀態ノモタラスサマザマノ效果ヲ決定スルタメノ法技術的ナ手段ニスギナイノデアル。グロテイウスノ時代以來、カレノ禁止ニモ拘ラズ多數ノ大國ガ開戰宣言ナクシテ戰鬪ヲ開始シテイル。英國ノモーリス將軍ハ、一八八三年「開戰宣言ヲ伴ワザル戰爭」ト題スル勞作ヲ公刊シテ一七〇〇年カラ一八七二年マデノ間ニ起ッタ多クノ戰爭ノ開始ヲ檢討シタガ、一九〇四年四月、「十九世紀以後」誌ノウテニ次ノヨウニ書イテイル。「數字的ニイヘバ、私ノ比較的詳シク檢討シタ期間ヲ通ジテ、英國ハ三十回、フランスハ三十六回、ロシアハ七回（但、トルコ及ヒ支那ヲ含ム隣接アジア諸國ニタイスル慣行的ナ無宣戰戰鬪ハ算入シナイ）、プロシアハ七回、オストラリアハ十二回、北米合衆國ハ少クモ五回、戰爭開始ノ宣言ヲ伴ワナイ戰鬪行爲ヲ行ッテイル」ト。

英國、フランス、ロシア、オストラリア、合衆國ノ如キ大國ガカカル國際法ノ技術的勧告ニ從ワナカツタトノ故ヲモツテ、戰爭ニ關スル背信ト裏切行爲ノ常習犯人デアツタト主張スルノハ誠ニ滑ケイトイワザルヲエナイ。

第三海牙條約ガ調印國ニタイシテ法的義務ヲ負ワシメタモノデアルカドウカニツイテハ爭ヒガアル。ローレンス、ウエストレーク及ビベロットノゴトキ英國ノ著名ナ國際法ノ權威ハ、石條約ノ文辭ハ調印國ニタイシナンラノ法的義務ヲ課シタモノデナイコトヲ示シテキルト考エテイル。ウエストレークハ、本問題ニ關スル石ノ規定ハソレ以前ノ法ヲ著シク變更シタモノデハナイト考ヘテイル。又ピット・コベットノ古典的ナ「主要國際法判例集」（ヒユー・エツチ・エル・ベロット編サンノ一九二四年版）ノ第二卷第十八頁ニハ次ノ如ク述ベラレテイル。

「同時ニ調印國ハ、事前ノ開戰宣言ナクシテハ絕對ニ敵國行爲ヲ爲サザル旨ヲ審約シタノデハナク、單ニ、交戰國相互間ニオイテハ、戰闘行爲ヲ「事前

且明瞭ナル通告ナクシテ開始スベキデハナイ」コトヲ認メタニスギナイ。ソノ目的ガ開戦ノ宣言ヲ発スル権限ヲ有スル者トノ通信ガ困難テ場所カ、又ハ相手方ガ不意打デアルト非難スル理由ノ存セザルコト明白ナ状況ノ下ニオイテ、戦闘準備モシクハ行動ヲ抑圧スルタメニ、即時実力ヲ行使スル必要ガ生ズルヤウナ場合ヲ除外セントスルニアツタコトハ明カデアル」ト、ソシテベロットハ慣習及ビ條約ノ課スル制限ニモ拘ラズ、戦闘行為ノ開始ハ結局主トシテ戦術ノ問題ニスギナイヤウデアルトイツテソノ議論ヲ結ンデイル。

右ニ引用シタ一節ハ、他ノ學者ノ論サンニカカル同書ノ一九三七年版ニオイテモ変更サレテハイナイ。

シカシナガラ他方、第三海牙條約ノ調印國ハ法的義務ヲ負擔シタノダト主張スル論者モアル。例ヘバオツペンハイムハ、「海牙條約ノ結果事前ノ開戦宣言モシクハ條件附最後通牒ヲ発セズシテ敵對行為ヲ開始シタ場合ハ國際法上ノ義務違反トナル、トノ述旨ヲ述ベテイル。

カリニコノ後ノ學說ガ正シク、コノ國際法ノ技術的ナ規則ノ違反ガ國際法上ノ義務違反トナルモノトシテモ、カカル違法行爲ハ、オツペンハイムノ見解ヲ以テシテモ單ナル契約違反、モシクハ民事上ノ不法行爲ノ性質ヲモツニトドマリ、「國際法上ノ犯罪」ノ性質ヲモツモノデハナイ。イカナル國際法學者トイヘドモ未ダ嘗テ、第三海牙條約ノ調印國ガ、右ノ技術的規定ノ違反ニ關與シタ政治家ニ刑事責任ヲ負ハシメルコトニ合意セルモノト考ヘタモノハナイデアラウ

(三)首席檢察官ハサラニ進ンデ、「一九一九年日本ヲ含ム戰勝國ハ、國際條約ノ侵犯ガ可罰的犯罪デアルコトニ意見一致シタ」ト述ベテヰル。

首席檢察官ハ、恐ラク第一次世界大戰ノ終リニ戰爭ノ開始及ビ戰爭中ニ犯サレタ慘虐行爲ニタイスル責任ヲ檢討スルタメ、豫備的講和會議ニヨツテ指名サレタ十五人委員會ノ勸告ノコトヲイツテヰルノデアラウ。該委員會ガ、「カクモ前例ナキ問題ニツキ、講和會議ガ特別ノ措置ヲ講ジ、サラニ進ンデ

コレラノ行爲ノ張本人ニタイシ應分ノ處斷ヲ加ヘルタメ特別ノ機關ヲ設置スルコトヲ相當トスル」旨報告シ「向後カカル重大ナ國際法ノ基本原則侵犯ニタイシテハ、刑罰制裁ヲ規定スルコトガ望マシイ」ト宣言シタコトハ事實デアル。

シカシナガラ第一次大戰ト第二次大戰トノ間ニオイテ右委員會ノ報告ニ從ツタ國ハナカツタ。又該委員會ハ、例ヘバ、ルクセンブルグ及ビベルギー侵入ノ如ク、條約上ノ義務違反ヲ構成スルカコロノ「世界大戰ヲチヨウハツシタ行爲及ビコレニ伴フ行爲」ヲ以テ、ソノ責任者タル當局及ビ個人ニタイシ、刑事訴追ヲ行ウ充分ナル理由ト認メルコトヲ拒否シタ。コレハトリワケ戰爭原因ノ探究ハ、證人ノ記憶ニタヨラザルヲエナイ、又アル程度審理及ビ處罰ノ迅速ヲ必要トスル裁判所ニオイテ適當ニコレヲ處理スルコトヲ不可能トスル複雜ナ問題ヲ含ム立證上ノ困難ガ存シテキルカラデアルトスル。首席檢察官ハコノコトヲ全然默殺シテキル。

(四)次ニ首席檢察官ハ、一九二四年ノ壽府議定書ノ前文及ビ一九二七年九月二十七日ノ第八次（第十八次ノ誤？）國際連盟總會ノ宣言ヲトリアゲル。コレラノ

文書ノウチニ「侵略戦争ハ国際的罪悪デアル」トイウ字句カ存スルノデアル。

コノ字句ハ超国家的イデオロキーガ支配シタジエネヴアノ空氣ヲ反映シタモノデアル。シカシソヴイエト聯邦ハ當時「反共産主義的ナ」聯盟ノ外ニアツタ。又北米合衆國モ又歐洲政治ニ捲込マレルコトヲオソレテコレニ加盟シテヰナカツタ。合衆國ニオケル國際法ノ最高權威タルジヨン・バセツト。モーアハ、ジエネヴア的國際法及ビコレニ刺戟サレタ憲府設定書ハ、國家内ニオケル法ト、主權國家カラ構成サレル社會ヲ規整スル國際制度トノ間ニ緊密ナ類似性ガ存スルモノトシヘル安易ナ假設カラ生レタモノデアツテ、ソレハ健全ナ國際法ヲ破壞スル狂信的ナ理論デアルトシテコレヲ攻撃シタノデハナカツタカ。英國自身モ未ダ強制調停ヲ認メル用意ガデキテヰナカツタコト及ビ本條約ノ實際上ノ作用イカンガ疑問デアルトイウ理由カラ、設定書ノ批准ヲ拒否シタノデハナカツタカ。カクシテ右設定書ハ遂ニナンラ法的效力ヲ發生スルニ至ラナカツタノデアル。又連盟

總會ハ世界ヲ拘束スル權能ヲモツモノデハナカツタノデアル。ノミナラズ、石條約ノ前文中ニオケル「國際的罪惡」トイフ辭句ハ丁度「齒榻子ヲ使ハナイゴトハ衛生上ノ罪惡デアル」トカ「アルバート紀念碑ハ美學上ノ罪惡デアル」トカイフ言葉ト同ジク、非難ノ意ヲ強ク表現スルタメニ用ヒラレテキルノデアル。首席檢察官自身、冒頭陳述第六頁ニオイテ、「許スベカラザル罪惡」トイフ言葉ヲ使ツテイルガ、コレモオソラク石ノヨウナ志味ニ用イラレタモノデアロウ。同樣ノコトハ又、首席檢察官ノ引用シタ一九二八年二月十八日ノ第六次汎アメリカ會議ノ決議ニオケル、「侵略戰爭ハ全人類ニタイスル國際的罪惡ヲ成ス」トノ宣言ニツイテモイエルノデアル。カクノゴトキ非難ハ、政治的モシクハ道德的考慮ニ基クモノデハアツテモ、法的意味ハ全然モタナイノデアル。

（以下次頁ニ續ク）

D.D.S.14

(三)最後ニ首席檢察官ハ、モットモ重要ナ一九二八年ノ巴里條約ニ言及スル。

ブリアン氏ガ特定ノ政治的目的ノタメニ提案シタ米佛相互條約案カラ發展シタコノ有名ナ多面的條約ハ、周知ノ如ク、ソノ眞ノ意味イカンニツイテ政治的及ビ法的見地カライロイロナ論議ヲジヤク起シタ。

該條約ノ本文ハ、一般ニ國家ノ手段トシテノ戰爭ヲ排シ一切ノ紛爭ヲ平和的手段ニヨツテ解決スルコトヲ約スルキワメテ簡單且ツ抽象的ナ表現ヲトツテイル。

コノ條件ヲモツテ歷史上ノ新紀元ヲ劃スルモノトシ、傳統的ナ國際法ノスベテノ規定ヲ時代遲レナモノトスル、人類ノ心理ニオケル一ツノ革命デアルトスル一派ノ論者モアツタ。シカシ懷疑派ハ友好通商條約中ニ規定サレテイル、條約國相互間ニハ「永久ノ平和」アルベシトカ、「完全且ツ不可侵ノ平和」アルベシトカイウ、ヨリ斷言的ナ宣言ト同ジヤウニ、該條約ノウチニ平和ヘノ意志ノ敬ケンナ表現以外ノ何モノヲモ認メナカツタノデアル。

ブリアン氏ノゴトキ俊敏ナ歐洲ノ政治家ハ、該

條約ノウチニ國際連盟及ビ欧洲政界ニ參與スルノ用意ヲ表白シタ合衆國ノデエステユアヲ看取シタノデアル。現ニブリアンノ友人デアルボンクールハ「ブリアンニトッテハ、右條約ハ何ヨリモ先ズ合衆國ヲ國際連盟ニヒキ込ム手段デアッタ」トハッキリ言明シテイルノデアル。

該條約ノテキストバカリデナク、列國ノ間ニ交サレタ當前ノ交換文書ヲ注意深ク分セキシタ多クノ著名ナ國際法學者ハ、同條約ハ、古典的ナ「正當ナル戰爭」ナル言葉ヲ「防衛戰爭」ナル語ヲモッテ置キカエル、單ナル國際法用語ノ變更ヲモタラシタニスギナイトイウ結論ニ達シテイル。中ニハ該條約ハ戰爭ヲ違法トスルドコロカ、カエッテコレトハ反對ニ防衛戰爭ノ適法性ヲ確認シタモノデアルトスル者サエモアルノデアル。

コウシタ歷史的背景ヲ念頭ニ置キッツ、ワレワレハ、調印國特ニ日本國ガ負擔シタ法的義務、日本ガ違背シタト檢察側ノ主張スルコノ法的義務ノ正確ナ意味内容ヲ分析シヨウ。

國際條約ヲ解釋スルニアタツテハ、當事者ノ眞意ヲ捕ソクセネバナラヌコトハ、スベテノ國際法學者ノ認メルトコロデアル又カカル眞意ハ單ニ條約文自体ニトドマラズ、サラニソノ豫備的資料ヲモ參照シテ確定セネバナラヌコトモ遍ク承認サレルトコロデアル。ソシテ實際上モ裁判所ヤ仲裁裁判所ヤ外交官ナドハ、條約ノ解釋ニツイテオオイニ豫備的資料ヲ尊重シテイルハイド教授ハ國際法ニ關スルソノ標準的著書ノウチニ左ノゴトク述ベル。

「締約國ガソノ協定ノ條項ニ付與シタ意味ハ條約ノ解釋ヲ委託サレタ者ノ判斷ヲ拘束スルモノデアリ、該事實ニツイテ證明力ヲ有スル一切ノ事情ハ、ソノ事實ノ確定ノタメノ證據タルコトヲ認メネバナラヌカラ、解釋規則ヲツクルコトハ殆ド役ニ立タナイ。コノ點ニ關シ立證ヲエラレナイ場合ハマレデアル。カカル證明ヲ全然缺ク場合ニオイテサヘ、一國ガアル條約中ノ字句ニ特別ナ意味ヲモタセルコトニ同意シタトナスコトハ危險デアル」。

ダルストンハソノ権威的著作「國際裁判所ノ法ト手續」ノ中デ次ノゴトク述ベル。

「條約ノ調印ニ至ル事件ハ、該條約ヲ締結シタ當事者ノ意思ヲ説明スルモノトシテシバシバ援用サレ、當事者ノ意思ヲ決定スル上ニ最モ重要性ヲモツ場合ガ多イ」。

フイリツプ、マーシヤル。ブラウンハアメリカ國際法雑誌一九二九年四月號所載ノ論文ニオイテ常ニ巴里條約ニ關連シテ次ノゴトク述ベテイル。

「國際法ノ原則中、條約ノ解釋ハ當事者ノ意思ニ照シテコレヲナスベキデアルトノ原則ホドハツキリト確立シタモノハナイヤウデアル。

カカル意思ハ當然條約文自体ノウチニ表示サレテイルト推定サレルルガ、ソノ他ニモ、調印モシクハヒ准ノ際ニ條約ニ附加サレル特別ノ留保カ、又ハヒ准ニ先立ツ交渉ノ間ニナサレル解釋説明、了解、制限、條件ナドヲ援用スルコトモ可能デアル。ソレ故戰爭ホウ棄ニ關スル一般條約ニヨツテ負擔シタ義務ノ性質ニツキ、將來ナンラカノ意見ノ相違ガ生ジタ場合ニハ、當然交

渉ニ關スル公ノ交換文書ノミナラズ、サー・オーステイン・チエンバレンヤブリアンヤケロッグ國務長官、ボラー上院議員ノヨウナ政府代辯者ノ言明ヲ參照セザルヲ得ナクナルト思ワレル。

本條約ニ對スルコレラノ人々ノ解釋ハ、モットモ緻密ナ吟味ト尊重ニ値スルノデアル。合衆國ノ公約ニ關スル限リ、アメリカニヨルヒ准ノ條件トナツタ該條約ノ「眞ノ意味」ナルモノヲ保障シテイル上院外交委員會ノ報告書ハ、司法裁判所ニヨル場合デアルト、國際ヨリ關ニヨル場合デアルトヲ問ワズ、ヒトシク考慮サレネバナラヌトコロデアル。……

「條約ノ各國印國ノ意思ヲ確定スルタメ、又各國印國ヲシテ本條約ニモトヅクソノ公約ヲ嚴密ニ履行セシメルタメニ、各國印國ガヒ准前ニコノ重要ナ宣言ニツイテ下シタ解釋ヲ充分ニ尊重且ツ信頼スルコトハ、各國ノ點カライツテモ合理的見地カラシテモ將又法的觀點カラシテモヨイコトト考ヘラレル」。

サテ、ワレワレハ石ノ如キ一般ニ認メラレタ解釋ノ準則ニ從ツテ、當時ノ責任アル政治家ノナシタ聲明ヲ檢ミルコトトシヨウ。

ケロッグ國務長官ハ、一九二八年四月二十八日ノ演説ニオイテ次ノ如ク述ベル。

「アメリカノ作成シタ不戰條約ハ由ニハ、自衛權ヲ制限乃至キ損スルガ如キ點ハ少シモ存ジナイ。自衛權ハスベテノ獨立國ニ固有ノモノデアリ、又アラユル條約ニ內在シテイル。各國家ハイカナル場合ニオイテモ、又條約ノ規定イカンニカカワラズ、攻撃モシクハ侵略カラ自國ノ領土ヲ防衛スル自由ヲモチ、自衛ノタメニ戰爭ニ訴ウル必要ガアルカドウカハ、ソノ國ノミガコレヲ決定シ得ルノデアル。正當ナ理由アル場合ニハ、世界ハムシロコレヲ容サンシ、コレヲ非難シナイデアラウ。」

次デケロッグ國務長官ワ、石條約調印ヲ通告セラレタ各國政府ニアテタ一九二八年六月二十三日ノ覺書ニオイテ、フランスノ提出シタ六項目ノ重大ナ「考慮事項」ニ關連シテ條約ニ對スル彼自身ノ「解釋」ヲ明カニシタ後次ノ如ク述ベタノデアル。

カカル事情ノ下ニ、余ワココニ貴政府ノ考慮ヲワズラワスタメ、上述シタ樣ニ更ヲ含ム戰爭ホウキニ關スル多邊的相互條約ノ草案ヲ傳達スルノ光榮ヲ有スルモノデアル。」

合衆國ニオイテハ周知ノゴトク本條約ノ「モンロー」主義ニ及ボス效果ニツキ懸念サレタノデアツタガ「ケロツグ」氏ハ上院ニタイシテ將來例ヘバ「ベナマ」共和國ニオイテ合衆國ガ起スコトアルベキ軍事行動ノミナラズ一般ニ「モンロー」主義ノ保障モ又本條約ハ自衛行爲ヲ排除セズ且自衛行爲デアルカドウカニツイテハ合衆國ノミガコレヲ判定スル權利ヲモツコトノウテニ含マレル旨ヲ確言シタ。

自衛ノ點ニツイテ「ケロツグ」氏ガ上院デ爲シタ說明ニヨレバ自衛ハアメリカ領土ノ防衛トカ「モンロー」主義ノ防衛トカニ限定セラルルモノデハナク世界各地ニオケルアメリカノ「權利」ノ防衛ヲ指スモノデアル。

又「ボラー」上院議員ハ上院ニオケル本條約ニ關スル討論ノ際ノ發言中ニ米西戰爭ハ自衛戰爭デアルコト各國トモ自國民ノ生命ガ外國ニオイテ危險ニ曝サレタ際コレヲ保護スルタメ實力ヲ行使スル權利ヲ留保シテヰル旨ヲ强調シタノデアル。

ソシテ「モーア」判事ハ「私ハ從來常ニ（ボラー）上院議員ガ（戰爭追放）ノ擁護者トシテ本問題ニツイテ一般ニ知ラレテヰル以上ニ大キナ役割ヲ演ジタモノト應測シテヰタ。氏ガ一九二八年ニオケル大統領選擧ニオイテ勿論戰爭ノ擁棄ヲ强化スルタメデハ

ナク合衆國ヲシテ転ニ充分ニ保障サレタ自衛權ノ行使ヲ可能ナラシムルタメニタエズ有力ナ海軍ノ存置ヲ具望シタノヲ見タトキ特ニサウデアツタ」イフテキル。

一九二八年五月十九日、英國政府ハアメリカ政府ニタイシテ、國策ノ手段トシテノ戰爭ヲホウキスル部分ヲ引用シタ後、ソノ福祉ト統一トガ英國政府ノ平和ト安全ニトツテ特殊ノ、且死活的ナ利害ヲモツ一定ノ地域ガ存スルコト、並ビニ該地域ニタイスル攻撃ニタイシテコレヲ守ルコトハ自衛手段ニ他ナラヌ故、右地域ニ對スル干渉ハイカナルモノモコレヲ甘受シエザル旨ヲセン言シタ覺書ヲ手交シタ。右覺書中該地域ノ何タルカハ指定サレテオラズ、將來イカナル地域ヲモツテカカル地域トスルカニツイテノ完全ナ行動ノ自由ガ留保サレテキルコトニ注意スベキデアル。該覺書ハケロツグ國務長官ノ演說中ニ解說サレテイル「自衛權」論ニ關スル英國政府ノ、ヨリ具體的ナ解明デアツタ。オースライン・チエンバレンハ、將來ノ奚說ナイ至當ニタイシテコウ果的ナ先手ヲウツタメニ、七月十八日ノ覺書ニ次ノゴトキ明確ナ條件ヲ附シテイル。スナハチ

「五月十九日附覺書中、ソノ福祉ト統一トガ英國ノ平和ト安全ニ特殊ノ且死活的ナ利害ヲモツ一定ノ地

域ニ關スル部分ニツイテハ、英國政府ハ、新條約カ右ノ點ニ關スル英國政府ノ行動ノ自由ヲナニラソコナウモノデナイコトノ諒解ノモトニコレヲ受諾スルモノナル旨再言スルニ止メル」。

ナルホドソヴイエツト政府及ビペルシア政府ハ英國ノ留保ヲ認メルコトヲ拒絶シタガ、將來英國政府ガケロツグ・ブリアン條約違反ノ責ヲ問ハレタ場合ニ、カクモ細心ナ注意ヲモツテ起草サレ、條約ノ本文ト共ニ正式ニ國際連盟ニ寄託セラレタ自衛ニ關スルソノ解釋ヲ採用シナイトイフガ如キハ、想像デキナイコトト考ヘラレテイタノデアル。又ブリアンハ七月十四日ノ覺書ニオイテ左ノ如ク言明シタ。

「コレニ加エテ、共和國政府ハ、フランスノ立場カラ述ベタ各種ノ所見ヲ滿足セシメルタメ、合衆國政府ガ新條約ニタイシテ與エタ見解ヲ了承スルコトヲキン快トスル。ーーーーーーーー

カカル事態ニオイテ、又カカル條件ノ下ニ、共和國政府ハ合衆國ニタイシテ、今ヤ本條約ニ調印スル完全ナ意圖ヲ有スル旨ヲ通告シウルコトヲキン快トスルーーーーーーーー」。

シカラバ日本政府ニツイテハ如何

一九二八年七月二十日、東京ニオイテ田中義一男爵カラ駐日アメリカ代理大使エドウイン・エル・ネヴイル氏ニ手

奏シタ覚書ニオイテ、日本外務大臣ハケロッグ氏ガ四月二十八日ニ爲シタ前述ノ演説ニ言及シテ、「貴下ハ一一四月二十八日ノ演説中ニオイテ國務長官ノ爲シタル説明ヲ詳細ニワタリ再説セラレ候」トイイ、サラニ左ノ如ク述ベル。

『帝國政府ハ本年五月二十六日附「マクヴエー」閣下宛書翰中ニ陳述セル如ク去ル四月提出セラレタル條約原案ニ對スル帝國政府ノ了解ハ亜米利加合衆國政府ノ了解ト實質上同一ナルヲ以テ今般提議セラレタル修正ニ對シ哀心賛同シ得ルコトヲ欣快トスル旨貴下ニ通報スルノ光榮ヲ有シ候仍テ帝國政府ハ右ノ了解ノ下ニ今般提示セラレタル案文ノ條本條約ニ署名方訓令ヲ發スルノ用意有之候』

樞密院會議ニオイテ、ソノ承認ヲウルタメ條約草案ガ提出サレタ際、久保田、富井兩顧問官カラ、自衛ハ領土ノ防衛ノミニ限定サレルモノデアルカドウカ、支那及ビ特ニ滿蒙ニオイテ實力行使ガ必要トナツタヤウナ場合ニ該條約ガカウシタ實力行使ニ適用セラレウルガ、サラニ英國ト同樣ニコノ點ヲ明瞭ニシメテヲクノガヨクハナイカト質問ガ爲サレタニ對シ、政府ノ回答ハ、自衛ハ領土ノ防衛ニトドマラズ領土外ニモ及ブモノデアルトイフニアツタ。實力手

段ニヨル満洲ソノ他ノ地域ニオケル権益ノ保護ハ、
本條約ハ實行為ヲ排除スルモノデハナイコトニヨ
ツテ充分認メラレテヰルトイフノデアツタ。コノ點
ハ戰爭抛棄ニ關スル一般條約批准ニ關スル樞密院會
議ノ審査報告書中ニ明記サレテヰル。

（以下次頁ヘ續ク）

ソレ故、自衛ノ性質ニツイテ日本ノ外務大臣ガ樞密院會議ニオイテ爲シタ說明ハ、アメリカノ上院ニオイテケロツグ國務長官ガ爲シタ說明ト實質的ニハ同一デアツタノデアル。勿論各國政府ハ、眞面目ニト リ上ゲルニ足リナイ單ナル「ジエスチユア」トシテコレラノ宣言ヤ留保ヲ爲スモノデハナイ。ムシロソレトハ反對ニソレラハ條約セラレタ義務ニツイテ各政府ノ諒解ノ下ニ且眞劍ナ公式聲明デアル。アタカモソレガ本條約第一條ニ書キ入レラレタト同樣ニ條約上ノ義務ノ固有且本質的ナ部分ヲ構成スルモノデアル。

首席檢察官ハ條約ノ本文ニ「犯罪」トイフ語ガ用ヒラレテキナイ舉ヲ認メルガ條約ノ本文ノミナラズ交換文書ノドコニモカウシタ觀念ハ見出シエナイノデアル。國際式「制裁」觀念ハアメリカ國務長官ニトツテハ宗教デアツタ。首席檢察官ハ調印國ガ侵略戰爭ヲ「違法」トシタト主張スル。「侵略戰爭」トイフ言フ者ノ好イ言葉ハ後ニ明カニサレル樣ニ曖昧デ捕捉シ難ク且定義シエザル言葉デアル。然シ假ニ一步ヲ讓ツテ交戰國目身ニヨツテ非自衛戰爭ト認メラレ

タ戰爭ハ本條約ニヨッテ違法デアルトシヨウ。首席檢察官ハ次イデソレガ國際上「犯罪」ダト言明スルノデアル。首席檢察官ノ論理進行ハワレワレノ到底理解シエナイ處デアル。ワレワレニトッテハ條約ノ締約當事者ガ交戰者自身ニヨッテ自衛行爲ト認メラレザル戰爭ヲ違法ナリトスルコトニ合意シタトノ事實ハカカル條約ノ違反ヲ當然犯罪トシタモノデハナイ。ソハ契約違反モシクハ民事上ノ不法行爲デハアッテモ決シテ犯罪デハナイ。アルコトオ違法トスル約束ハ當然ニソレガ犯罪デアルコトヲ含ムモノト何故言ルノカ當事者ノ意思ヲ探究スルコトヲ第一次的原理トスル契約解釋ノ根本原則ニ從ヒ注意ヲ拂ッテイタダキタイ。果シテ本件ニオイテ引用セラレタスベテノ契約的文書ノ當事者ノ意思ハソレラノ契約ノ條項違反ガ個人ニ對シテ恣意的ナ刑事責任ヲ招來トスルトイフニアッタト考ヘルコトガデキルデアラウカ。

モシモ當事者ガ眞ニカカル意思ヲ有シタノデアッタナラ必ズソノ旨ヲ明示シタデアラウ。政治家ニ刑罰ヲ科スルトイフヨウナ全然新奇ナ場合ニフサハシイ段階的刑罰ト手續トヲ定メタノデアラウ。少クモ武

刀的衝突ノ場面カラ遠クハナレタ内閣及ビ議會ニオイテ行ハレタ行爲ニ對スル個人ノ責任ニツイテ規定ヲ設ケタデアラウ。

然ラバ調印國ハ本條約ノ違反ガ違反國ノ可罰的犯罪タルコトヲ意圖シタノデアラウカ。國際制裁ヲ世界平和ヘノ唯一ノ道ト信ズル少數ノ熱狂的學者ノ中ニハカカル見解ヲトツタ者モ二。三アルカモ知レナイ。然シキハメテ最近ニ屬スル當時ノ學界ニオイテサヘカカル主張ハ殆ンド見當ラナイノデアル。

本條約ニ對シテ留保ヲ賦與セント試ミタ有名ナ「ブタペスト」會議條項ハ勿論締約國ヲ拘束スルモノデハナイ。シカモ同條項スラ右條約違反ガ犯罪ヲ構成スルモノトハイツテ居ラズ單ニ「違反國ハ本條約ノ違反ニヨリ條約調印國若クハソノ國民ニ加ヘタル一切ノ損害ヲ賠償スル責ニ任ズ」ト規定スルニ止マルノデアル。

以上述ベタトコロニヨツテ首席檢察官ノ擧示シタ證據ニヨツテハ侵略戰爭ガ文明諸國ニヨツテ承認サレタ慣習ニヨツテ國際法上ノ犯罪トナツタトノ主張ハナニラ證明サレテキナイコト明白デアル。首席檢察

官ハ自ラノ結論ガ國際法學徒ノ承認ヲ受クルモノナルコトノ證據トシテ「ライト」卿ノ「敵性犯罪ト國際法」ニツイテノ論説ヲ引用シテキル。

「ライト」卿ハタシカニ著名ナ法律家デアル。シカシ卿ハ本論文ニオイテハ戰判官トシテデハナク辯護人トシテ自國ノ政府ノ主張ヲ支持スル目的デ明ラカニ一方的ナ議論ヲ展開シテキルノデアル。コレハムロン不當ナコトデハナイ。卿ハ國際法ノ領域ニ足ヲ踏ミイレタ。コレハライト卿トシテハ恐ラク初メテノ經驗デアラウ。國際法ハ多年ノ研讀ト特別ノ素養ヲツンデハジメテ理解シウル、キハメテ特殊ナ法ノ分野デアツテ、コンモン。ロヤトハ多クノ點ニオイテ著シク相違シテキルコトガ記憶サルベキデアル。

「一羽ノ燕デ夏ヲトスル」コトガデキナイ樣ニ卿ノ唱イ獨自ニヨツテ國際法ヲトスルコトハ出來ナイ。

假ニライト卿ノ立論ガ一九四六年ニオケル全テノ現代ノ國際法學者ノ承認スルモノデアルトシテモ（ソンナ事ハ絶對ニナイノデアルガ）ソシテ又國際法ガ今次大戰甲ニオイテ急激ニ且ワレワレヲ聞驚ツカセル程ニ變化シタノダト假定シテモ（ワレワレハ全

クソレヲ知ラナカツタガ）カカル新奇ナ法規ヲ當法廷ノ被告人ニ對シテ適用スルコトハ明カニ遡及的適用デアツテ不當デアル。

加之、國際慣習法ガ全テノ國家ヲ拘束スルモノトシテ確立サレタコトヲ證明スル爲ニハ國際會議ヤ條約ノ兩文ニヲイテ爲サレタ表然タルソシテ屢々單ニ條件的ナ宣言ノミデハ不充分デアル。ワレワレハ須ラク心素（主觀的要件）ノミナラズ實素（客觀的要件）スナハチ各國ノ實際上ノ實行ニ着目セネバナラヌ。然ルニ各國ノ實際上ノ實行ハ侵略戰爭ガ實任アル國家モシクハ國家ノ中ノ實任アル個人ノ刑罰實任ヲ伴フモノデアルトノ命題ヲ否定スルモノデアル。「イタリー」ノ「エチオピア」侵入ハ國際聯盟ニヨツテ「侵略戰爭」トミナサレタガ聯盟ノ科シタ制裁ハ經濟斷交ニスギナカツタ。「ムツソリーニ」及ビソノ內閣ハ勿論ノコト「イタリー」ニ刑罰ヲ科スルコトヲ提案シタモノハ一人モキナカツタ。一九三九年ノ「ソヴイエツト」露西亞ノ「フインランド」侵入モ聯盟ニヨツテ侵略戰爭ノ烙印ヲ捺サレタガコレニ對シテトラレタ唯一ノ手段ハ單ナル除名處分デアツ

タ。ソシテ「ソヴイエツト」聯邦又ハソノ指導的ナ政治家軍人ヲ處罰スルコトヲ考ヘタ者ハ一人モナカツタノデアル。

侵略戰爭ハ國際犯罪デアルトノ檢察官ノ提出スル命題ノ今一ツノ難點ハ「侵略」トカ「侵略者」トカイフ併句ガ漠然トシテ定義シエナイモノデアルコトデアル。何ガ「侵略」トナルカノ問題ハ「ヴエルサイユ」條約中獨乙ニ對シ「獨乙ノ侵略ニヨリ聯合國ノ一般人民及ビ其ノ財産ニ加ヘラレタル一切ノ損害ノ賠償ヲ要求シタ規定及ビ「聯盟國ガ聯盟各國ノ領土保全及現在ノ政治的獨立ヲ尊重シ且外部ノ侵略ニ對シ之ヲ擁護スルコトヲ約一シタ國際聯盟規約第十條ニオイテ使用サレタ併句ニヨツテ一般大衆ノミナラズ國際法學者ノ注意ヲモ惹イタノデアル。「侵略者」ナル語ハ聯盟規約中ニハ用ヒラレテヰナイガ時々聯盟內ニオイテ聯盟ノ制裁ヲ適用スベキ國家ヲ呼ブ技術的用語トシテ用ヒラレタコトモアル。「ジエネヴア」ソノ他ニオイテ法律家ニヨツテ「侵略者」ヲ定義ズケントスル幾多ノ試ミガ爲サレタガ、イヅレモ失敗ニ終ツタノデアル。

先ヅ最初ニ首席検察官ノ引用ニ係ル「ウエブスター」辞典ノ「最初ノ攻撃」トイフ簡潔ナ辞書的定義ヲトリアゲテミヨウ。侵略者トイフノハ最初ニ発砲シタ者ノ謂デアル。「ブリアン」曰ク、「大砲ノ一発ハマサニ大砲ノ一発ダ。」ソシテ「ソレハ開エルシ、展々ソノ痕ヲ遺ス。」マサニソノ通リデアル。然シコレハ単ニ物理的ナ標準ニスギナイ。ソレハナンラ自然的ナ道徳的モシクハ法的ナ意味内容ヲ有シナイノデアル。「モーア」判事ハ「理性ニ訴フ」ト題スル有名ナ論文（「フオリン・アフエアズ」誌一九三三年七月號）ニオイテ、「国家ハ戦争ヲ始メル場合ニハ、常ニ外部行為ヲ排斥スルタメニ戦争ヲ始メルト称スルガ、カカル行為ノタメニ戦争ヲ始メルノデナイ場合ガ多イ。他ニ援助シテクレル武力ガアルトイフ確信ハ必然的ニ戦争ヲシヨウトスル傾向ヲ強メルデアラウ。加之、侵略ヲ理由付ケルタメ巧妙ニ相手ノ公然タル行為ヲ挑発スルコトガ往々アルトイフコトハ顕著ナ事実デアル」ト述ベテキル。「ウエブスター」ガ上述ノ定義ニ代ル定義トシテ「挑発セラレザル攻撃」トイツテキルノハカカル理由ニ基クノデアル。然シ近代国家ニシテナニラ挑発ニヨラナイデ戦争ヲ始メルヨウナ国ガアルカ。

「モーア」判事ハ語ヲ續イデイフ。

「・・最初ニ實力行動ニ出ルコトガ、自然ノ安全ノ爲ノ唯一ノ手段タル場合モアラウ。カカル原則ハ各國若クハソレゾレノ國家的集團ガアクマデ軍事力ノ保持ヲ維持セントスルコトニヨツテマスマス重要ニナル。「ボルトガル」ハ佛・西兩國ノ混合軍隊ガ一七六二年自國ノ國境ヲ侵犯シテヰタ際、右ノ原則ニ基イテ行動シタノデアル」。

次ニ同ジク首席檢察官ノ引用スル別ナ定義ヲ考ヘテミヨウ。

「侵略者トハ、既ニ紛爭ヲ平和的解決ニ委ヌルコトニ合意シタルニカカハラズ、カカル誓約ニ違反シテ戰爭ニ訴フル國ヲイフ。」

コレハ明カニ不完全ナ定義デアル。何故ナラソレハ仲裁手續ニ委ヌルコトニ合意シタ國家ガ後日自衛ノタメノ軍事行動ノ必要ヲ認ムル可能性ヤ、サラニ紛爭ハ存セズ單ニ重大ナ脅威ノミ存スル場合ヲ無視シテヰルカラデアル。右ノ定義ハ「メキシコ」及ビ「支那ニオイテカツテ屢々行ハレタヨウニ不統一ナ國家ニオイテ秩序ヲ維持スルタメ軍隊ヲ上陸セシムルコトヲ正當トスルカ否カ。或ハ又、兩國共平和的折衝ヲ試ミルコト

ナク、又平和的折衝ガ失敗シタ場合ニ仲裁手續ヲ試ミルコトナク實力ニ訴ヘテハナラヌ旨明文ヲ以テ規定シタ一八四八年ノ米墨條約ニカカハラズ一九一四年突然「ヴエラクラツズ」ヲ襲ツテコレヲ占領シタ合衆國ハ侵略者デアルカドウカ。又英國ガ一九二三年、國際聯盟規約所定ノ解決方法ヲトラズニ支那ヘ軍隊ヲ派遣シタノハ侵略行爲デアルカドウカ。

ワレワレハ「ジエネヴア」ソノ他ニオイテ法律家ヤ非法律家ニヨル長短様々ナ定義ダケノ試ミニツイテコニ詳シク論ズル必要ハナイ。ソレラハミナ定義シエザルモノヲ定義セントシテ失敗シタノデアル。國際聯盟ニ代表セラレタ列國ハコレラノ定義ヲ排斥シタ。ソシテ「オーステイン・チエンバレン」卿ハ、「ソレ故余ハカカル侵略者ノ定義ヅケノ企テニ對シ依然トシテ反對スルモノデアル。蓋シカカル定義ハ無實ヲ招レルワナトナリ、非アル者ニ對シテハ道徳トナルカラ」トイツタ。又「ケロツグ」國務長官ハ「ケロツグ・ブリアン」條約ガ討議サレタ際、不戰條約ノ範圍ヲ侵略戰爭ニ限定セントノ佛國ノ提案ニ對シテ、一ツハマサニ右ノ理由ニヨツテコレニ反對シタデハナカツタカ。「モーア」判事ハ更ニ言フ。

「侵略者ノ問題ヲ最初ノ一撃デ決定シヨウトスルコトガ屢々ニヨッテ決ミガ正義ヲ無視シタモノデアルコトガ屢々ニヨッテ決定的ニ證明サレタノデ、ワレワレハワレワレノ目的ガ不淨デナイカギリ、事實ノ公平ナ調査ニタヨラネバナラヌ。然シソレニハ時日ヲ要スル。國際聯盟總會ハ一九三一年九月二十一日日支事變ニツイテ當初ノ態度ヲ取得シ、「リットン」委員會ノ報告書ハ一九三二年九月四日支那ノ北平デ調印セラレ、總會ハ一九三三年一月十七日自己ノ任命シタ委員會ノ報告書ヲ採擇シタ。コノ手續ガ實際ニ費シタ期間ハ十七ケ月ニ及ビ、シカモナホ最後ノ結論ハ未ダ得ラレナカッタノデアル。」

又「リットン」報告書自身次ノ如ク述ベテヰル。

「前章ヲ讀ンダ者ニトッテハ、本紛爭ノ包含スル問題ハシバシバイハレテイルヨウニ簡單ナモノデナイコトガ明カデアラウ。イナソレラノ問題ハ著シク錯雜シテ居リ、全事實トソノ歷史的背景ニソイテ精シイ知識ヲ有スル者ノミガ、コレラノ問題ニツイテ、ハッキリシタ見解ヲ述ベル資格ヲ有スルノデアル。本件ハ、一國ガ事前ニ國際聯盟規約所定ノ和解手續ヲ盡スコトナク他國ニ宣戰シタトイフコトヰ事實デハナク、又一國ノ國境ガ隣國ノ武裝兵力ニヨッテ侵サレタトイフヨウナ簡單ナ事件デモナイ。延シ滿洲ニハ、コレト正確ニ一

ルヨウナモノハ、世界中ノ他ノ如何ナル地ニモ存シナイ程度ガ多々存スルカラデアル。」

カクシテワレワレガ侵略ヲ定義スルコトヲヤメ、国際ノ個々ノ事件毎ニ特定ノ戦争ガ侵略的デアルカ防衛的デアルカヲ裁判所ノ決定ニ一任スルトスレバ、カカル裁判所ノ判決ハ、援ルベキ何等ノ基準ガナイタメ、時代ノ政治的偏見ニ支配サレル傾向ヲ伴フデアラウ。ナゼナラ「侵略者」トイフ言葉ハ、国際政治ニオイテ、シバシバ為ニスル意図デ用ヒラレル。イヒカヘレバ全世界ヲシテ相手方ヲ仲間ハズレニサセルタメニ用ヒラレタモノダカラデアル。而平和ニ関スル事件ノウチ政治ト密接ニ関係スル性質ノモノニツイテハ正ニ適当デアル。

以上ノ考察ニ鑑ミ、ワレワレハ首席検察官ノ説ハソレガ現行法デナイバカリデナク、又コレヲ法トスベキデナイト主張スル。一見コノ発言ハ事情ニ通ゼズ且無思慮ナ人ヲ惹キツケル。シカシワレワレガコレニ熱意ヲ加ヘルトキソレハ不正ヲ招来セザルヲ得ナイ原理デアル。カカル原理ヲ適用スルコトハ、将来ノ戦勝侵略者ガソノ被害者ノ責任ニオイテ利益ヲ収メルタメノ最モ危険ナ先例トナルデアラウ。ワレワレハカカル法理ハ、国際法ノ前提ナル境域カラ追放セラルベキ似而非法律的原則デアルト主張スルモノデアル。

ニ、國際法條約等ヲ侵犯スル戰爭

次ニ首席檢察官ハ、國際法、條約、協定及ビ保障ヲ侵犯スル戰爭ノ計畫、準備、開始若シクハ遂行ニ關スル所謂「平和ニ對スル罪」ヲ問ズル。ソシテ「コノ點ニツイテ、法ハ充分ニ確立シテ居ツテ數世代ニワタツテ實施サレテイル」ト言ハレルノデアル。

カツテ「ケロツグ」條約成立ノ際、アメリカ國務長官ガ自衛行爲ノ制限ハ無數ノ先例ニヨツテ明瞭ニ確立シテイルト述ベタノニ對シテ國際法學徒ハ、コレ等無數ノ先例ガ何デアルカ分レバ、マコトニ興味深イコトデアルト言ツタガ、彼等ノ好奇心ハ遂ニ滿タサレナカツタ。同樣ニ、所謂「平和ニ對スル罪」中コノ部分ハ「充分ニ確立シテ居ツテ數世代ニワタツテ實施サレテイル」トノ言葉ニ接シテ、國際法學徒ハイヅレモ目ヲコスツテ、自ラノ耳ヲ疑ハザルヲ得ナカツタロウ。

國際法及條約ガ遵守サルベキコトハ、被告人ヲモ含メテ、イヤシクモ分別アル者ノ少シモ疑ハナイトコロデアル。首席檢察官ハ、「コレ等被告人ハ之等（卽チ條約ノ規定）ガ全ク無意味ナ言葉ニ過ギヌト主張スルノデアロウカ」ト問ハレル。シカシ國家ハ國際法及ビ條約ヲ無視シテモカマハナナ

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イト考ヘル程、被告人ガ低劣ナ道徳ノ持主デアルトイフガ如キハ、著シク不當デアル。ナルホド國家ハ特定ノ場合ニ國際法及條約ニツイテ、條章上ノ對シテ法違反若シクハ約束違反ヲ云爲スルコトモアル。然シコレハ公正ナ裁判所ノ判定スベキ事項デアル。國際法ヤ條約ヲ冷笑スルコトハ必ズシモ國際法若シクハ條約ソノモノヲ軽蔑シテイルコトヲ意味スルモノデハナイ。ソレハ、一定ノ國際法規則ヤ條約ノ特定條項ニツイテ、當時ノ有力國家ガ下シタ解釋ニ對スル不信ノ氣持ノ表現ニ過ギナイ場合モ多イノデアル。古代「ギリシヤ」ノ「ソフイスト」ヤ、近代ノ「マルクス」主義者等ガ法ヲ支配階級ノ利益ノ表現ニ過ギヌトシテ排撃スル場合、ソレハ時ノ權力者ニ對スル攻撃ニ他ナラヌコトガ多イノデアル。一方國際法ノ規定若シクハ條約ノ條項ノ違反ガアツタ場合ニ、何人モソレガ違法デアルコトヲ疑フ者ハナイ。然シアル國家ノ行爲ヲ違法デアルト宣言スルコトト、所謂行爲ノ責任者タル個人ヲ有罪トシ、コレニ極刑ヲ科スルコトトノ間ニハ大キナ隔リガアル。全テノ文明國ハ契約違反若シクハ民事上ノ不法行爲ヲ悉ク犯罪トハシナイ。前者ニ對シテハ賠償ガ、後者ニ對

シテハ庭罰ガ適當ノ救濟方法デアル。

首席被告官ニ一向トシテ第三ヘイグ條約ヲ引用スル。我々ハ先ニ述ベタコトヲ再ビココデ繰返サウトシナイ。假ニ百歩ヲ讓ツテ、右條約ノ違反ガ凡ユル場合ニ適法デアルトシテモ、ソレハ責任者タル個人ノ犯罪ヲ構成スルモノデハナイ。條約ヲ侵犯スル「平和ニ對スル罪」ノ庭罰ノ如キハ、國際法ニ未知ノ事項デアル。法ハムシロ首席被告官ノ主張トハ反對ノ方向ニ確立シテイル。被告人ハ首席被告官ノ主張スル様ニ、自己ノ行爲ガ「犯罪」デアルコトヲ勿論「知ツテ」ハイナカツタ。何故ナラ、何人モ彼告人ガ國際法上犯罪人デハナイコトヲ「知ツテイタ」カラデアル。

五、殺人ノ罪

次ニ我々ハ被告人ガ殺人罪ヲ犯シタモノデアルトスル奇異ナ訴追事由ニ關スル首席被告官ノ事明ニ遭遇スル。

首席被告官ハ日本ノ刑法典ヲ引用シテ、法律上正當ノ理由ナクシテ故意ニ人ヲ殺害スルコトハ、文明國ニ於テハ殺人ノ罪ヲ構成スルト論ズル。コノ點ニハコレヲ承認スルトショウ。首席被告官ハ語ヲ次イデ言フ。「本件ニ於テハ、死亡ハ忝ク交戰ノ結果トシテ生ジタモノデアリ、故ニ戰爭ガ適法ナ

以等デアツタカラ、本來ノ違法ナ行爲カラ自然ニ且適當生ズル結果モ亦違法性ヲ有ビル。コノ法理ハ日本ノ法律ニ於テモ認メラレテイル。」

矢張乍ラ我々ハ首席檢察官ノ國法ニ承服スルコトヲ得ナイ。首席檢察官ハ先ヅ「違法ナ」トイフアイマイナ形容詞ヲ用イル。ソコデハ「國際法上違法ナ」トイフ意味デ用イラレル。次ニ不當ニモ同ジ言葉ヲ「國内法上違法ナル行爲ノ結果ヲ一切伴フ違法」ノ意味ヲモモタシテ用イルノデアル。

然シ、國際法學徒ハ誰デモ、國際法ノ原理ハソウデナイコトヲ知ツテイル。戰爭ガ國際法若シクハ條約ニ違反シテ開始サレタトシテモ、戰爭狀態ハ發生シテ、交戰國ノ何レノ側モ戰爭法規ノ保護ヲ受クル權利ヲ取得スルトイフコトカ、國際法學者ノ一致シタ見解デアル。

「ローレンス」教授ハソノ著「國際法原理」ノ中デ、何等ノ挑發ヲモ受ケズ又ハ前ノ外交交渉ヲモ行ハズシテ攻撃ヲ加ヘルトイフ極端ナ場合ヲ引イテ次ノ樣ニ論ク。

「完全ナ平和裡ニアツテ獨メ自己ノ要求ヲ知ラシメズ、又外交手段デ充足ヲ得ル努力モシナイデ他國ヲ攻撃スルコトハ國際的ナ匪賊行爲ニ他ナラナイ。又恐ラクソレハコウシタ取扱ヲ受ケルデア

コウ。」ト云ヒ彼ハ附加ヘル。

「然シ其ル惜ムベキ手段ニヨツテ開カレタ其意ハ、ソレニモ拘ラズ戦争デアツテ、双方トモ戦争法規ニ従ツテソノ軍事行動ヲ行フコトガ期待サレル、」

ナルホド海戦ハ全人類ニ對スル犯罪人トシテ處罰サレル。シカシ海戦ハ如何ナル政府カラモ授権ヲ受ケズシテ行動スルモノデアル。政府ノ授権ニ基イテ行動スル正規ノ軍隊ノ一員ヤ、戦争開始ニツキ政治的責任ヲ有スル者ヲ、單ニ戦争ガ違法ナ方法デ開始セラレタトイフダケノ理由デ、殺人犯人トシテ取扱フトイフガ如キ顕ル奇異ナ抗議デアル。

完全ニ組織化サレタ社會テアル國家内部ニ於テ内亂ヲ計畫、準備、開始シタモノハ違法ナ行爲ヲ犯スモノデアルコトハ明白デアル。國内法ハ當然之等ノ者ヲ大逆罪ノ犯人トシテ取扱フ。然シ國内法テスラ通常之等ノ者ヲ政治犯人トシテ取扱フノデアツテ、通常ノ「兇漢」若シクハ「殺人犯人」トシテハ取扱ハズ、國際法モ亦コレヲ犯罪人引渡カラ除外シテイル。

首席檢察官ハ更ニ第四ヘイグ條約ノ各規定ヲ引用スル。ソノウチ同條約第二十三條ハイフ。

「特別ノ條約ヲ以テ定メタル禁止ノ外特ニ禁止スルモノ左ノ如シ。

(ロ)敵國又ハ敵軍ニ屬スル者ヲ背信ノ行爲ヲ以テ殺傷スルコト」

首席檢察官ハ右ノ規定カラ次ノヨウナ結論ヲ引キ出シテヰル。

「從テ、日本ト平和關係ニアツタ他國ニ對シテ、無警告ノ攻撃ヲ加ヘルコトハ、最モ惡質ナ背信行爲デアリ、海牙條約ノ規定ニヨレバ、カカル攻撃中ニ人ヲ殺害シタ行爲ハ殺人罪トナルノデアル。」

重大ナ挑發ヲ受ケ、長期ニワタル外交交涉ノ努力ヲ盡ネタ末、一國ガ他國ニ對シテ矢然戰略的攻撃ヲ加ヘタ場合ニ、シカモ相手方ニオイテ專ラガ極メテ緊迫シ、戰鬪ノ開始ヲ豫期シ、且コレニ備ヘテヰタヨウナ場合ニ、カカル攻撃ガ第三海牙條約ニヨツテ違法トサレ、且又「最モ惡質ナル背信行爲」トヨバレウルカドウカハ頗ル疑問デアル。シカシ法律論ヲススメルタメニ百歩ヲ讓ツテ、カリニコレヲ前定スルトシテモ、首席檢察官ノ結論ハ右ノ規定カラ直ニ演繹サレエナイ。何故ナラ「背信ノ行爲ヲ以テ殺傷スル」トノ辭句ハ明カニ、「既ニ行ハレツツアル戰爭中」ニトイフ意味デアル。然ラザレバ右ニカカゲタ法文中ノ「敵國又ハ敵軍」ナルモノハ存シ得ナイ

テアラウ。第三海牙條約ノ規定スル、宣戰ヲ伴ハイ戰鬪開始ニ關スル行爲ノゴトキハ、モトヨリ首席檢察官ノ引用スル右規定ニフクマレルモノデハナイ。ワレワレハ首席檢察官ガソノ主張ヲ說明シタソノ冒頭陳述ヲバ、著名ナ法律家ニタイシテフサハシイ深キ敬意ヲ以テ研究シタ。シカシワレワレハ卒直ニ首席檢察官ノ議論ハ「兎ノ手品」ヲ行フ手品師ヲ想起セシムル種類ノモノデアルトノ感想ヲ告白セネバナラヌコトヲ遺憾トスル。手品師ハ通常ノ帽子ヲ借リテキテ、コレヲ、テーブルノ上ニ置ク。ソシテコレニ向ツテ何ヤラ呪文ヲ唱ヘル。サテ帽子ヲトリアゲル。スルトテーブルニハ小サナ兎ガ、ウヨウヨ走リマワツテキル。帽子ノ中ニモトモト兎ガキタノデハナイ。手品師ガ兎ヲソノ中ニ入レタマデデアル。

首席檢察官ノ議論ハマサニコレト同然デアル。首席檢察官ハ普通ノ帽子、スナハチ、カノ國家國民ヲ拘束スル國際法ナル綺麗ナソシテ上品ナ周知ノシルクハツトヲ持ツテキテ、コレヲテーブルノ上ニ載セル。ソシテコレニ向ツテ呪文ヲ唱ヘル。ソノ呪文ノ中カラ「違法」トカ「犯罪的」トカ「殺人」トカイフ言葉ガ次第ニ大キク響イテクル。ソシテ帽子ヲトリアゲルト、忽チ裁判所ノ中ニハ、國内法ノココカシコカラ借リテキタ新生ノ國際法理論ガ現ハレテ、觀衆ヲ驚カセル。ドコカラソレラヲモツテキタカハ

トモカクトシテ、モトモトソレラノ理論ガ、シルクハットノ中ニナカツタコトダケハ確カデアル。首席検察官自ラソレラヲ、シルクハットノ中ニ入レタノデアル。

六「通例ノ」戦争犯罪

「通例ノ」戦争犯罪及ビ「通例ノ戦争犯罪」ノ一部ヲナスカギリニオイテノ「人道ニ對スル罪」ニツイテハ、國際法ノ確定法規ニ從テ有罪ガ立證サレタ場合ニ、コレヲ處罰スベキデアルコトハワレワレモコレヲ認メル。

由來戰爭ハ非人道的ナモノデアル。人間ガコレニ付與シタ一切ノ理由ヅケヤ辯解ヲ除去シテ「汝殺ス勿レ」トイフ基督ノ示サレタ最高道德カラ判斷スレバ、戰爭ハ防衛的デアルト侵略的デアルトニカカハラズ必然的ニ殺人行爲ヲ伴フ制度ト認メザルヲエナイ。戰爭ニ伴フ血ナマグサイ軍事行動ガ、コレニ關與スル者ヲ殘忍ナラシメ、ソレカラ幾多ノ殘虐行爲ヲ生ゼシメル傾向ガアリ、例ヘバ一般市民ニタイシテモ特ニ彼等ニ敵對行動ノ嫌疑アル場合ニ、慘虐行爲ガ加ヘラレルコトハ、戰史ノ況ク示ストコロデアル。コレラノ暴行爲ハ戰爭ニ必然的ニ隨伴スル惡シムベキ現象デアル。テモ、罪アル者ニタイシテハ刑罰ヲ科スベキコトハ國際法ノ命ズルトコロデアリ、且又カカル犯罪ノ遂

行者ニタイシテ峻厳ナ裁判ガ為サルベキコトハ、日本政府ガソノ名誉ニカケテ履行ヲ誓約シタ「ポツダム」宣言ノ條項ニヨツテ疑ナイ。戦争ノ法規慣例ニ違反シテ惨虐行為ヲ現實ニ犯シタ者ハ、ソレガ強制ニヨルモノデナイカギリ、自己ノ上官ニヨツテ該行為ヲ命ゼラレタ場合デモコレヲ處罰シテ然ルベキコトデアラウ。又カカル行為ヲ命ジタ上官モ勿論處罰シウルデアラウ。サラニ又カカル上官ガカカル違法行為ヲ防止シエタ場合ニハ、重大ナ過失ノ故ヲ以テコレヲ處罰シテ然ルベキデアル。

境界線ニアツテイヅレトモ判別シ難イ事件ニツイテハ若干疑問ガ起ルコトハアルトシテモ、トニカク以上ノコトハ國際法上確認セラレタ法理デアル。シカシ、當法廷ノ被告人ノウチ、眞人デナカツタ者ハ惨虐行為及ビソノ他ノ戦争法規違反ノ命令ヲ發シタコトナク、又重大ナ過失ノ責ヲ問ハルベキデモナイコト勿論デアル。何故ナラソレラ被告人ハ、日本ノ憲法制度上「統帥」ノ領域ニ關スル事項ニツイテハナンラ干渉スル權能ヲ持タナカツタカラデアル。

被告人ノウチ眞人デアツタ者ニ關シテモ、ソレラノ被告人ガ惨虐行為モシクハソノ他ノ違反行為ノ遂行ヲ命ジタカ、又ハ個人的ニ重大ナ過失ヲ犯シタカイヅレカノ事實ガ立證サレザルカギリ有罪デアルト

ハイヘナイ。首席檢察官ハ、訴追者側ノ「上カラノ命令」ナル訴追事由ニツキ「推定」ヲ、シカモ「推定」ノミヲ根據トシテキル。斯シソノ結論ニイフ。「コレラノ殺人行爲ハ、以上述ベタル如キ極メテ廣範圍ナ地域ニオイテ極メテ長期間ニワタリ又極メテ相類似セル型ニ則ツテ行ハレ、且ツモノ抗議ガ中立國ニヨツテ確實ニ傳達セラレタ後ニオイテモ、多數ノ犯行ガ繰返サレタ點カラミテ、ワレワレハ上カラノ、ニナハチ被告席ニアル被告人ノ積極的命令ノミガ、カカル犯行ヲ可能ナラシメタモノト推定セザルヲ得ナイ。」

シカシ被告人ガイカナル段階ノ地位ニオイテ命令ヲ發シタカガ明カニサレネバナラナイ。段階ノ如何ヲ問ハズ、モシクハ一定段階以上ノ者ハスベテ、有罪ナリトノ無差別的推定ヲ爲スコトハ、正義ノ本質ニ背馳シ、周到ナ注意ヲ以テ實アル者ニタイシソレ相當ノ責ヲ負ハシムベキコトヲ本裁判所ニ期待スル全世界ノ良心ノ反撥ヲ招ク コトデアラウ。

檢察側ノ主張スル慘虐行爲モシクハソノ他ノ違反行爲ガ、カリニ同一ノ行爲類型ヲトツテキルトシテモ、カカル型ハ國民性モシクハ民族性ノ反映デアルニスギヌノカモシレナイ。犯罪ハ藝術上ノ傑作トヒトシク、種族ノ慣習ヲ反映スル一定ノ特徴ヲ示スノデアル。又、地理的、經濟的及實事的條件ガ相互ニ

類似シテヰルコトモ、アル程度カカル検察側ノ主張スル惨虐行爲ソノ他ノ違法行爲ノ「類型性」ヲ説明スルモノデアラウ。本件ノゴトキ重大事件ニオイテハ、上カラノ命令ナル推定、並ニ何人カラソレガ發シタカノ點ハ合理的疑問ノ余地ヲ殘サヌ程度ニ立證セラレナケレバナラナイ。

（以下次頁へ續ク）

七、個人責任

首席被宗官ハ更ニ進ンデ、被告人ノ個人責任ニツイテ論ズル。首席被宗官ハ、國際法若シクハ國際條約ヲ侵犯スル戰爭ノ計畫、準備、開始、遂行ガ個人責任ヲ伴フトノ說ニヨル理由開ケルタメニ、カノ「サボタージュ」事件デアル「エックス。パーデイ。クイリン」事件」ニ對スル合衆國最高裁判所ノ判決ヲ引用スル。然シ「エックス。パーテイ。クイリン」事件ハ、合衆國議會ガソノ制定スル法令ニ於テ、或爭法免違反ノ全テノ犯罪ヲ、細目ニワタツテ不動ノ形式ニ法文化スルコトノ代リニ、裁判所ノ承認シ適用シ得ル範圍デ、單ニ裁判所ノ適用スベキ普通法（コンモンロウ）ノ体系ヲ採用スルコトガ、可能デアルカドウカトイフ事件ナノデアル。コレハ、遡及デナイ限リ、ソノ欲スル様ナ形式ニヨツテ立法ヲ行イ得ル點ニ關シ議會ノ法令ノ解釋ノ問題デアルニ過ギナイ。裁判ニ關シテ議會ノ意志ニ對シテ最高裁判所ノ下シタ解釋ハ、他國民ヲ拘束スルコトニハナラナイノデアル。

更ニ又從來ノ慣習ニヨツテ、單ニ裁判ニヨリ個人ヲ處罰シテ來タヨウナ、既ニ充分確立シタ變化ニ過ギスル普通法（コンモンロウ）ヲ採用ノ方法ニヨツテ採用スルコトト、國際法及條約ヲ侵犯スル戰爭ノ計畫、準備、

國始、遂行ノ當該國家ノ責任ノミデナク、當該國家ノタメニ行動シタ個人ノ刑事責任ヲ伴フモノデアルトイフ、全ク革命的ナ理論ヲ採用スルコトノ間ニハ大キナ隔リガアル。所クノ如キ理論ハ、國際法學者及ビ國際慣習ニヨッテ、ハッキリト否定サレテ居リ、又何レノ國ノ責任アル政治家デモ、國際條約ヲ商議スル際、右ノ如キ原則ニ考ヘ及ンダ者ハナイノデアル。若シモ右ノ如キ解釋ガ、商議ノ際提案サレタトシタラ、ソレラノ條約ハ成立ニ至ラナカッタコトデアロウ。例ヘバ「ケロッグ」條約ノ當事者ハ之ニ違反シテ戰爭ヲナシタ場合、彼等ト自國ノ兵士トガ殺人罪ヲ犯シタコトニナルトイフ意志ヲ有シタモノデアルト考ヘルコトガ出來ルカ。最近ノ國際聯合憲章ノウチニモ所クノ如キ理論ヲ見出スコトハ出來ナイ。若シモ所カル趣旨ノ規定ガ置カレタトシタラ、憲章自体ガ採決ニ至ラナカッタカモ知レナイ。

國際法タルト國内法タルトヲ問ハズ、凡ソ法ハ立法ニヨッテ發達スルト同時ニ、判例ニヨッテモ發達スル點ニツイテハ、我々ハ心カラ首席檢察官ノ意見ニ賛同スルモノデアル。シカシ、裁判判例ニヨル法ノ發展ハ、アル法体系ノ根本精神ト、ソノ基本原理ノ枠ノ中デ行ハレルモノデアリ、又行

ハルベキモノデアル。我々ガ法ノ歴史ヲ一瞥スルナラバ、裁判所ガソノ實施スル法ヲ發展セシムルニ當ツテ、如何ニ注意深ク且愼ヘ目デアツタカガ分ルデアロウ。裁判所ノ働キハアタカモ大自然ノ運行ト等シク、徐々ニ人目ニツカナイ程度ニ行ハレテ來タノデアル。決シテ、突然ニ又飛躍ニ行ハレタノデハナイ。カルガ故ニ、彼等ノ業績ハ恒久性ヲモツノデアル。裁判所ハ確立シタ法ヲ施行スルタメニ存在スル。裁判所ハソノ下ス判決ニヨッテ、法ニ革命的ナ變革ヲ齎スベキモノデハナイ。ソシテ若シモ、裁判所ガ法ヲ變革シヨウト試ミルナラ、ソレハ正ニ、立法府ノ權能ヲ僭奪スルモノデアル。

ナルホド裁判所ガ往々法ノ假面ノ下ニ、實質的ニ立法スル場合モアル。然シカカル司法的立法ハ、試驗的ニ且細心ナ注意ヲ拂ッテ、アル場合ハコレヲ包含シ、他ノ場合ニハコレヲ排除スルヤリ方デ徐々ニ行ハレルノデアッテ、法体系中ノ基本原則ヲクツガヘストイフヨウナ方法デソレハ行ハレルノデハナイ。「ホームズ」判事ハ、南太平洋會社對「ジェンセン」事件（合衆國最高裁判所判例集一九一七年二四四卷、二〇五頁、二二一頁）ニ於テ次ノ如ク述ベテイル。

「私ハ裁判官ガ立法スルコトヲ認メルニ躊躇ス

ルモノデハナイ。シカシ裁判官ハ法ノ間隙ヲ塡メルタメニ立法シ得ルニ過ギナイ。ソノ機能ハ大塊カラ粒子ヘノ微細化作用ニ限定サレテイル。コンモン。ロオノ裁判官ハ、自分ハコンシダレーションノ理論ハ無意味ナ歴史的遺物ニスギナイト考ヘルカラ、自分ノ法廷デハコレヲ認メナイトイフコトハ出來ナイ。又限定官轄ヲモツ海事裁判官モ同様ニ、自分ハ衡平ト屢人ニ反スルコンモン。ロオノ法則ハ立派ナ法則ダト考ヘルカラ、本裁判所ニ於テモソツクリコレヲ採リ入レタイト思フ、トイフコトハ許サレナイ。」

革命的ナ法ノ変更ハ、全国係者ヲシテ改正提案ニ動スル賛否ノ論議ヲ盡サシメタ後、初メテ妥當ニ行イ得ルノデアル。斯クノ如キ法ノ変更ハ、之ヲ正當化スル論據モ、又之ヲ非トスル論據モ著シク制限サレ、結局爭點當事者ノ辯護人ニ於テ、タマタマ利用シ得ル便宜ト知識ニ依存スルトコロ大ナラザルヲ得ナイ裁判所ノ、到底ヨクスルトコロデハナイノデアル。

（以下次頁へ続ク）

モシモ國際法ニ何ラカノ根本的變更ガ必要ナラバ、國際聯合ノヤウナ國際團體ガ世界立法府ニマデ發展スルトスレバ、カウシタ團體ガコレヲ行フニ適シタ機關デアル。ソレハタシカニ國際司法裁判所ヤ、又ハ國內的モシクハ國際的ナ軍事裁判所ノ仕事デハナイノデアル。或ハスデニコレラノ政府高官ニ個人責任ヲ負ハシメルトノ原則ヲ國際法ニ導入スベキ「時機ニ立至」ツテヰルノカモシレナイ。シカシ征服者ノ一方的見解デアルカノ如キ外觀ヲ呈スルヤリ方デカカル原則ヲ國際法ニ導入スルコトハ、ソノ眞價ニツイテ世人ノ疑惑ト不信ヲ招カズニハヲカナイノデアツテ、絕對ニコレヲ避ケネバナラナイ。カカルヤリ方ニヨツテ、コノ原則ノ確立ソノモノガ何世紀モ遲レルコトニナルデアラウ。

首席檢察官ハ裁判所ニタイシテ、國際法ノ体系ニ根本的變革ヲ加フベキコトヲ要請シタ後、再ビ共同謀議罪ノ理論ヲ、アタカモソレガ既ニ國際法ノ一側度ヲナスモノトシテ援用シ、裁判所條例ノ規定ニツイテノソノ論證ヲ結ブノデアル。カクシテ首席檢察官ハ、キハメテ妥當ナ個別刑事責任ノ原理ヲ無視シテ「日本政府ニ地位ヲ占メテ、コレヲ動カシ、ソノ地位ニヨリ違法ナ戰爭ヲ共謀シ、且計劃・準備開始・

遂行シタコレラノ人ハカカル行爲ノ結果生ジタ全テノ犯罪行爲ノ一ツ一ツニ付キ責任ヲ有スル」ト言明スル。首席檢察官ハ又、若干ノ國ニオイテミトメラレテキルヤウニミエル、犯罪ノ計劃ニ關與シタ者ハスベテミナ、ソノ遂行中共謀者ガ犯罪ヲ犯シタ場合、自ラカカル犯罪ノ事實ヲ知ルト否トニカカハラズ、又カカル行爲ヲ禁ジタト否トニカカハラズ、コレラノ犯罪ノ全部ニツキ又各々他者ノ行爲ニツイテ、責任ヲ負フトイフ他ノ國內刑法ノ理論ヲ引用シ、コレニヨツテ、ソノ立論ヲ强メヨウト努メル。

共謀罪ノ法理ト同種ノコノ法理ニツイテモ又、以人ノ者ガ違法ナ計劃ノ實行ニアタツタ場合、コレガイカニ些細ナモノデアツテモ、カカル計劃ノ遂行中ソノ一人ガ犯シタ犯罪ニ對シテ、右犯罪ノ大小イカンニカカハラズ、又タトヘ自ラハ右犯罪ノ事實ヲ知ラズ、該犯罪ガ自己ノ與ヘタ注意ニ反シテ行ハレタニセヨコレニタイシテ責ヲ負フトイフ非論理的ナ英米法理論ガ、國際法ノ一部ヲナスモノデナイモノトシテ排斥サレンコトヲワレワレハ裁判所ニタイシ要請スル。コノ理論ニヨレバ、例ヘバ、獵ニ出カケタ一團ノ人々ガ違法ニ獵ヲ行フ際、ソノウチノ一人ガコレヲ妨害ヲシタ者人ヲ故意ニ殺害シタ場合ニ、他

者ハスベテミナタトヘカカル行爲ヲ現實ニ知ラナクトモ、又之レヲ知ツタナラコレヲ防止スルタメニ万全ヲ盡シタデアラウ場合デアツテモ、殺人ノ罪ヲ犯シタモノトスルノデアル。純歷史的ナ理由ニモトヅイタカクノ如キ特殊且不當ナ理論ガ世界ノ全テノ國民ニヨツテ法トシテウケトラレルト考ヘルコトハ、常識ニ對スル冒瀆デアル。

首席檢察官ハ、唯一ツノ點、スナハチ公ノ地位ハ被告人ヲ保護セズトノ理論ヲ除イテハ、本裁判所條例中ニ規定サレタ法ハ、條例起案ノ當時デナシニ、被告人ノ行爲ノ當時ノ國際法ノ規則ト原則デアツタト主張スル。コノ立論ニヨレバ、事後立法ノ問題ハ本件デハ問題ニナラナイトイフノデアル。コノ點ニツイテモ又ワレワレハ全面的ニコレヲ爭ヒコノ點ニツイテノ裁判所ノ御判斷ヲ仰ギタイ。首席檢察官モ、國家責任ノ他ニ個人責任ガ成立スルトイフ理論ハ、通及的デアルコトヲ實質上認メテイルコトニナル。シカシワレワレハサラニ進ンデ、「通例ノ」戰爭犯罪ノ場合ヲ除キ本裁判所條例ノ規定スル法ハ明白ニ且全部事後ノ法デアリ、從ツテ「ポツダム」宣言ニヨツテ「峻嚴ナル裁判」デハナク、法ニヨル裁判ノ正反對デアル「ヒツトラー」式ノ漠然トシタ「一般

感情」ニヨル裁判トシテ排斥サレテキルモノデアルト主張スルモノデアル。

八、検察側ノ提議スル新國際法理論ノ性格ト目的

首席檢察官ハ裁判所ニタイシテ、侵略戰爭及國際法竝ニ條約ヲ侵犯スル戰爭ハ國際犯罪デアッテ、カカル犯罪ニタイシテハ當該國家ノタメニ行動シタ個人ニタイシテ通常ノ凶悪ノ受クベキ屈辱的處罰ヲ科シウルモノデアルトスル。コノ新奇ナソシテ首席檢察官ニヨレバキハメテ有益ナ國際法ノ原則ヲバ、歷史的ナ新判決ニヨッテ創造スルコトヲツヨク要請スル。

國際法ニ至大ノ影響ヲ及ボスベキカクノゴトキ提言ヲ受ケ入レル前ニ、ワレワレハソレヲ空想的ナ無理ナ道德的感情ノ表現トシテデハナク、又國家モシクハ超國家ノ背景ニオイテデハナク、主權國家カラ構成サレタ複雜ナ國際社會ノ背景ニオイテ現實ニ作用スル法的原理トシテ吟味セネバナラヌ。

戰時ニアッテ「侵略者」トイフ言葉ハ交戰國ノ双方ガ對等的ニ又異論ノ同情ヲヒクガタメニ、相互ニ相手方ニ對シテアビセカケル形容詞デアルコトハ、カクレモナイ事實デアル。ソシテ交戰國ノ一方ガ敗レタ場合、果シテ戰勝國自ラ自己ガ侵略的タルコトヲ認メテ、ソノ責任者タル政治家及軍人ヲ處罰スル

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デアラウカ。人間性ニ根本的ナ変革ガ加ヘラレナカギリ、喪落者、又ハ國際法及ビ條約ノ侵犯者デアルト宣告サレルノハ、當ニ戰敗國デアラウ。戰敗國ハ遠イ昔カラ、領土ノ喪失ト賠償ノ支拂ニヨッテ處罰サレテイル。ソシテ戰敗國ノ政治家ヤ軍人ハ、政治信ノ失墜、社會的生命ノ喪失、マタ愛スル祖國ガ廢墟トナルノヲ目撃スルコトノ苦痛ニヨッテ充分ニ處罰サレタノデアル。コレラノ罰ニ加ヘテサラニ刑罰ヲ科スルコトハ、洋ノ東西ヲ問ハズ、戰爭ノ終了ヲ特徴ヅケタ寛恕ノ永久的忘却、赦免、寛恕ノ高イ精神カラハルカニ後退スルコトヲ意味スルモノニ過ギナイ。

（以下次頁ニ續ク）

「国策ノ手段トシテノ戦争」トイフ言葉ハアイマイデアル。国防モ其ノ意味デハ最モ広義的ナ「国策」ノ要素ヲナスモノデアル。戦争デハ全部コレヲ違法トシ布モ戦争ノ準備ヲ為シタ者ハ、戦争ガ自衛的デアルト侵略的デアルトヲ問ハズ、国際法及国内法ニヨツテ処罰サルベキモノトスルコトハ、ヨリ正当且合理的デアリ、又世界平和ヲ促進スルユエンデアラウ。尤モカヽル提言ハ、現在世界ノ各国ガソレヲ遵ヘル用意アリヤ否ヤ不明ナ遺憾ノ事ヲ国是トハルモノデアル。然シ違法トサルベキ「戦争」ナル名詞ニ「侵略的」トカ「国際法モシクハ条約ニ違反スル」トカノ形容詞ヲツケ加ヘルコトハ、抽象的ニハ国ル合理的ニミエルガ実際的ニハ、「無事ニ済シテハワナ、罪アル者ニ罰シテハ遺憾」トシテ作用スル重大ナ危険ヲソノウチニ包蔵スルモノデアル。

首脳被察官ハカクノ如キ原理ノ確立ガ将来ノ侵略者ヲ戒ムスルタメニ必要デアルト主張スル。然シソレハコノマコトニ望マシイ目的ノタメニ必要ナモノデナイ。何故ナラ、敗戦ヲ予想シ乍ラ戦争ヲハジメルヨウナ政治家ハ治ドナイダラウ。又自国ガ戦争ニ敗レサル限リ民罰サレルオソレハナイ。敗戦ノ危険自体ガ最モ有力ナ戒メトナルホドソレ

ハ忘ルベキモノデアル。民衆ハ勝ツタ場合ニハ何等ノ成果トハナラナイ。何故ナラ勝利者ハカカル刑罰ヲ甘受スルコトナク、カヘツテ、コレヲ相手方ニ科スルカラデアル。世界平和ヘノ途ハ別ノ方向、スナハチ人民ノ経済的社会的改善ヘノ国際協力及ビ国際紛争ガ起ツタ場合、友好ト正義ノ精神ニ基イテ紛争当事者ヲ和解セシムルコトニアル。

首席検察官ハ「復讐及ビ返報トイフ卑シイ下劣ナ目的」ヲ力強ク否定スル。然シ、第一次世界大戦ノ歴史ヲ研究シタ者ハ、所謂懲罰式「シユレツクリヒカイト」ニヨッテ連合国ノ間ニ惹起サレタ一般的憤怒ノ念ガ戦争ノ張本人民衆ヲ裏求スル声々々タル輿ヲ捲キ起シ、連合国ノ指導的政治家モ、少クトモ一時、カクノ如キ感情ヲ満足セシメザルヲ得ナカツタ事実ヲ想起スルコトガ許サレルデアラウ。第二次大戦ニ於テモ、コノ点ニ関シ歴史ハ繰返サレテキルノデハナイカ。ソシテ検察官諸賢ハ同ジヤウナ民衆ノ感情ニ唱和シテ行動シツツアルソレゾレノ政府ノ政策ヲ実現スルタメニ最善ヲ尽シテキラルルノデハナイカ。

ソレバカリデハナク、文明諸国ガ数世紀ニワタツテ絶エズ国際的慣習ヲ重ネ理性的吟味ヲ加ヘツツ発展セシメタ国際法ノ若干原理ヲ、一時的ナ政

府ノ政策ニヨッテ変更スル如キハ誠ニ危険ナ企デアル。満洲ノ「カール・シュミット」一派ノ学者ガ満乙第三帝国ノ政治的要請ニ合致スルヤウナ新国際法ヲ創出セント試ミタコトハ周知ノ事實デアル。コノ企図ハ法ヲ政治ニ従属セシメントスルモノデアル。カルガ故ニ、光輝アル法官ノ伝統ニフサハシカラヌモノトシテコノ企テハ一度ニ糞尿サレタノデアル。カヽル企図ハ、ソノ動機ハ如何ニ美ハシクトモ、戦争熱未ダ去ラザル今日ニ於テ侍ニ遂ケネバナラヌトコロデアル。我々ノ子孫ノ為ニ我々ハコヽニ晋ク歩ヲ停メテ、「地獄ヘノ道ハ善意デ敷カレル」トイフ有名ナ「ドクタ・ジョンソン」ノ箴言、又、「コノ世ニオケル賞者ノ仕事ハ、善人ノモタラシタ害悪ヲ修正スルニアル」ト、「ウオルメーバジョット」ノイミジクモ表現シタ逆説ニ深ク思ヒヲイタスベキデハナイカ。

右東国際軍事裁判所ハ、本法廷ノ被告人ノミナラズ、全世界ノ政府ガウヤウヤシク長敬スベキ国際法ノ尊厳ヲ象徴スルモノデアル。我々ハ一方被察官諸賢ニヨッテ証メテ有能ニ代表サレテヰル最勝国タル聯合国政府ノ政策ト他方東洋ノ一敗地国ノ政治家及ビ軍人タル被告人ノ自由ト生命、否国際国ニ於ケル人格ヲ主張トスルコノ歴史ニ画期ノ

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ナイ刑事裁判ニ於テソノ判決ノ基礎ハ、確立シタル国際法デアルベキコトヲ裁判所ニ認シテ強ク要請スルモノデアル。法ノ認メナイ犯罪ヲ理由トシ、事後法律ニヨッテ厳刑ヲ科スルガ如キ正義ニ背ク原則ハ、必ズヤ我々ノ子孫ノ記憶ニ永クトゞマリ、東洋ト西洋ノ友好関係ト世界平和トニヨッテ必要ナ恒久ノ和睦ヲ阻害スル遺痕ヲ、遺スベキ世代ノ人々ノ感情ノウチニ残スコトトナル。ソレ故厳格ニ法ヲ遵守スルコトコソ裁判所ノ採ルベキ正シイ賢明ナ道デアル。周知ノ如ク国際法ノ原理ヲ固守スルコトニヨッテ、スコレニヨッテノミ、「文明」ソノモノノ不可分ノ要因ヲナス法ノ位ノ燈光ハ、永久ニ国際社会ヲ照シ、ユルグ灯ト シテナク、不動ノ燈明臺トシテ嵐吹キスサム世界ニ指標ヲ與ヘルコトトナルデアラウ。